IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-512

KONIAG, INC., et al.,
Petitioners,

v.

CECIL D. ANDRUS, *Secretary of the Interior,*
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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The petitioners Koniag, Inc., Cook Inlet Region, Inc., Bering Straits Native Corporation, and the Villages of Uyak, Uganik, Litnik, Anton Larsen Bay, Bells Flats, Ayakulik, Port William, Salamatof, Alexander Creek and Solomon respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered in this proceeding on April 28, 1978.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia, not yet reported, appears in the Appendix hereto as Appendix C. The opinion of the United States District Court for the District

of Columbia is reported at 405 F. Supp. 1360 (D.D.C. 1975) and appears in the Appendix hereto as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on April 18, 1978. Upon application timely made, petitioners requested and on July 10, 1978, were granted by Mr. Justice Brennan, a sixty day extension of time, to and including September 25, 1978, within which to file this petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May the Secretary of the Interior, having provided by published regulation that only "aggrieved" parties may appeal a determination of village eligibility made after notice and opportunity for hearing, nonetheless consider an appeal by parties not "aggrieved" by such a determination?[1]

2. Does a district court, having found that administrative proceedings have (a) violated plaintiffs' rights to due process and (b) been tainted by Congressional intrusion into the administrative process, exceed the bounds of its discretion in fashioning a remedy by reinstating the last untainted determination where Congress has required that the matter before the agency be resolved rapidly and with certainty?

3. Having once determined Native residence in the course of enrollment, pursuant to the Alaska Native

[1] The villages involved in this question are Anton Larsen Bay, Bells Flats, Solomon and Alexander Creek.

Claims Settlement Act, may the Secretary of Interior re-determine Native residence for village eligibility purposes after the time for determination of residence has expired?[2]

4. Upon appellate review of cases consolidated for hearing on cross-motions for summary judgment involving only questions of law common to two or more plaintiff villages, may a court of appeals remand to the Secretary of the Interior one of the cases prior to the determination by the district court of a dispositive issue of law in that case involving but a single village and therefore neither decided by the district court nor considered by the court of appeals.[3]

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.* are set forth in the Appendix hereto as Appendix A.

Title 5, United States Code, section 706, provides:

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. . . ."

The provisions of 43 C.F.R. § 2651 (1973) are set forth in the Appendix hereto as Appendix B.

[2] This question does not involve the Village of Salamatof.

[3] This question involves only the Village of Salamatof.

STATEMENT OF THE CASE

This action, filed by eleven plaintiffs[4] invoking the jurisdiction of the United States District Court for the District of Columbia pursuant to 28 U.S.C. §§ 1331, 1361, 1362, 2201 and 2202, challenged decisions of the Secretary of the Interior which found each of the villages ineligible for land and money under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601, *et seq.*

ANCSA sought to accomplish a fair, rapid settlement of all aboriginal land claims by Natives and Native groups of Alaska without litigation. 43 U.S.C. § 1601.[5] Under the Act, 40 million acres of land and $962,500,000 were to be disbursed to qualified regional and village corporations representing Native "residents." 43 U.S.C. §§ 1605, 1611, 1613, 1615.[6] In exchange, all aboriginal titles of the Alaska Natives and

[4] Individual actions were brought by Koniag, Inc. and the Village of Uyak (Civil Action No 74-1061), Salamatof Village Association and Cook Inlet Region, Inc. (Civil Action No. 74-1134), the Village of Uganik, and Koniag, Inc. (Civil Action No. 74-1790), the Village of Litnik and Koniag, Inc. (Civil Action No. 74-1792), the Village of Bells Flats and Konaig, Inc. (Civil Action No. 74-1793), the Village of Ayakulik and Koniag, Inc. (Civil Action No. 74-1794), the Village of Port William and Koniag, Inc. (Civil Action No. 74-1795), the Village of Solomon and Bering Straits Native Corporation (Civil Action No. 75-452), Sanak Corporation and Aleut Corporation (Civil Action No. 75-485), the Village of Alexander Creek and Cook Inlet Region, Inc. (Civil Action No. 75-1097). The cases were consolidated for purposes of summary judgment. Parties below not petitioners herein are Aleut Corporation and Sanak Corporation (Pauloff Harbor, in which the protest was withdrawn after the district court decision).

[5] *See generally* S. Rep. No. 92-581, 92d Cong., 1st Sess. (1971).

[6] Criteria for village qualification are set forth at 43 U.S.C. § 1610(b)(2), (3). Regional qualifications are not at issue.

claims based threon were extinguished, 43 U.S.C. § 1603(b), (c). Thus, unless a Native corporation establishes its entitlement under ANCSA, it receives nothing, although the land claims of its members are nevertheless extinguished. (A. 71).

The Secretary of the Interior was given the responsibility to administer the legislation and, in so doing, to determine each Native's place of residence, 43 U.S.C. § 1604(b), and the eligibility of each Native village. 43 U.S.C. § 1610(b)(2), (3).

Under ANCSA, a Native's residence determines: the Native's corporation membership, 43 U.S.C. §§ 1606(g), 1607(a), 1613 (h)(2), (3); the allocation of land among Native corporations, 43 U.S.C. §§ 1611 (a), (b), (c); the distribution of the $962,500,000 Alaska Native Fund among regional corporations, village corporations and non-village stockholders of regional corporations, 43 U.S.C. §§ 1605(c), 1606(j) and (m); the sharing among regional corporations of 70% of each regional corporation's revenues from timber resources and subsurface estate, 4 3U.S.C. § 1606(i). And it determines whether a given locality has the Native residents required for "village" status. 43 U.S.C. §§ 1602(c), 1602(e), 1610(b)(2) and (3).

Section 3(c) of the Act, 43 U.S.C. § 1602(c), defines a "Native village" as follows:

> (c) "Native village" means any tribe, band, clan, group, village, community, or association in Alaska listed in sections [11 and 16] of this [Act], or which meets the requirements of this [Act], and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives;

Sections 11(b)(1) and 16(a), 43 U.S.C. §§ 1610(b)(1), 1615(a), list 215 villages (the so-called Listed Villages) that were presumed to be eligible to receive benefits. The Secretary was directed by section 11(b)(2), 43 U.S.C. § 1610(b)(2), to review the Listed Villages within two and one-half years of ANCSA's passage (*i.e.*, by December 19, 1974). A Listed Village would be ineligible if the Secretary determined that:

> (A) less than twenty-five Natives were residents of the village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; or,
>
> (B) the village is of a modern and urban character, and the majority of the residents are non-Native.
>
> 43 U.S.C. § 1610(b)(2).

Other villages, the so-called "Unlisted Villages" could be found eligible:

> (3) Native villages not listed in subsection (b)(1) hereof shall be eligible for land and benefits under this [Act] and lands shall be withdrawn pursuant to this section if the Secretary within two and one-half years from [the date of enactment of this Act], determines that—
>
> (A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and
>
> (B) the village is not of a modern and urban character, and a majority of the residents are Natives.
>
> 43 U.S.C. § 1610(b)(3).

Of the village petitioners here, Uyak and Salamatof are Listed Villages. Each of the others is an Unlisted Village.

Before making the determinations required by section 11 of the Act, the Secretary adopted regulations to govern the village eligibility proceedings. 43 C.F.R. Part 2650, *et seq.*, adopted May 30, 1973, effective July 2, 1973, 38 Fed. Reg. 14218. (A. 74). These regulations required the Juneau Area Office of the Bureau of Indian Affairs to review the Listed Villages and applications of Unlisted Villages, and make initial determinations thereon not later than December 19, 1973. 43 C.F.R. §§ 2651.2(a)(1), (2), (6), (8). Proposed decisions of the BIA, which were required to be published, became final within 30 days of their date of publication unless protested by "any interested party." 43 C.F.R. §§ 2651.2(a)(3), (9). The Area Director of BIA was required to examine and evaluate any such protest and, within thirty days, render a final decision. 43 C.F.R. §§ 2651.2(a)(4), (10). The final decision of the Area Director or a protest could be appealed by an "aggrieved party" by filing a notice with the Ad Hoc Board.[7] 43 C.F.R. § 2651.2(a)(5).[8] The Secretary reserved to himself the ultimate decision in each case. 43 C.F.R. § 2651.2(a)(5).

Each of the original eleven plaintiff villages was initially found eligible by the Area Director. (A. 77). Protests were filed, *inter alia*, by the U.S. Fish and

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[7] Later called the Alaska Native Claims Appeal Board (ANCAB).

[8] If an appeal was taken, the case was assigned to an administrative law judge. After an initial *de novo* hearing, subsequent proceedings were held *in camera*, shielded from the knowledge and participation of plaintiffs. (A. 76, 77).

Wildlife Service,[9] the U.S. Forest Service,[10] or the State of Alaska.[11] After considering the protests, the Area Director made and published final decisions of eligibility. (A. 77). Claiming to be "aggrieved," appeals were taken by these protestants to ANCAB.[12] By *in camera* decisions, unknown and unavailable to petitioners until made public following approval months later by the Secretary of the Interior, it was finally determined that the villages were not eligible. (A. 77).

Prior to the institution of these proceedings and just before the deadline established in section 5 of the Act, 43 U.S.C. § 1604, the Secretary certified the Roll of Alaska Natives. This Roll shows the residence of each Native as required by section 5.[13] Notwithstanding this determination, the Secretary permitted new inquiries into residence in the course of the village eligibility proceedings. (A. 89).

[9] U.S. Fish and Wildlife Service filed protests against Uyak, Uganik, Anton Larsen Bay, Bells Flats, Ayakulik, and Salamatof.

[10] U. S. Forest Service filed protests against Litnik, Anton Larsen Bay, and Port William.

[11] The State of Alaska filed protests against Litnik, Anton Larsen Bay, Bells Flats, Port William, Alexander Creek and Solomon. The State's protests against Litnik, Bells Flats and Port William were dropped.

[12] *But see* n. 17 *infra*. Certain other protestants also appealed one or more of the decisions. Those appeals were either withdrawn or dismissed.

[13] The section provides so far as here material:

> "(a) The Secretary shall prepare within two years from the date of enactment of this Act a roll of all Natives who were born on or before, and who are living on, the date of enactment of this Act. Any decision of the Secretary regarding eligibility for enrollment shall be final.
>
> "(b) The roll prepared by the Secretary shall show for each Native, among other things, the region and the village or other place in which he resided on the date of the 1970 census enumeration, and he shall be enrolled according to such residence. . . ."
>
> 43 U.S.C. § 1604(a).

The determination of residence is critical to the eligibility of a village, since eligibility requires at least twenty-five residents.

While these village eligibility cases were before the Secretary, the Chairman of the House Subcommittee on Fisheries and Wildlife Conservation and The Environment of the House Committee on Merchant Marine and Fisheries, Hon. John D. Dingell, held hearings, relating to the administration of ANCSA.[14] Of these hearings the district court found that:

> The Committee, through its chairman and staff members, probed deeply into details of contested cases then under consideration, indicating that there was "more than meets the eye." The entire rule-making process was reexamined, travel vouchers and other information were sought to probe the adequacy of the investigations made, all papers in the pending proceedings were demanded, the accuracy of data and procedures followed was questioned, and constantly the Committee interjected itself into aspects of the decision making process . . . It was following this experience that settlements arranged with two of the plaintiffs Anton Larsen Bay and Bells Flats, were abandoned by the Department of the Interior because of the hearings. (A. 85, 86).

[14] Alaska Native Claims, Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries, 93d Cong., 2nd Sess. (1975).

As a result, the district court ruled that these hearings constituted "an impermissible Congressional interference with the administrative process" in violation of due process.[15] (A. 86). The district court also ruled that the procedures involved in the three-tiered administrative adjudication violated the Natives' rights to due process[16] (A. 84), and that certain appellants in the administrative proceedings before ANCAB had neither alleged nor proven their standing to maintain administrative appeals under the "party aggrieved" criteria of the Secretary's regulations.[17] (A. 82). Villages affected by the district court's holding on lack of standing were ordered reinstated on that ground. As to all villages, because of the Congressional mandate to resolve the settlement rapidly and with certainty, 43 U.S.C. § 1601(b), the court directed that the last untainted decision—that of the Area Director of the Juneau Area Office, Bureau of the Indian Affairs—be reinstated. (A. 87, 91).

The United States Court of Appeals for the District of Columbia affirmed the district court's findings regarding the violations of due process, but reversed on

[15] The correctness of this determination was not questioned by the court of appeals which disagreed with the district court only as to whether the taint of such interference continued. (A. 55).

[16] All villages were ordered reinstated by the district court on the basis of Congressional interference and lack of due process.

[17] Villages reinstated by the district court on the basis of protestants' lack of standing were Anton Larson Bay, Bells Flats, Alexander Creek and Solomon. In the cases of Anton Larsen Bay and Bells Flats, no lands within the jurisdiction of an administrative appellant were selected. (A. 81). In the cases of Solomon and Alexander Creek, the State of Alaska, the only administrative appellant, had neither selected nor indicated an intent to select land that would be conveyed to either village if eligible. (A. 81, 82).

the question of standing and the reinstatement remedy. (A. 55, 56). The court did not consider matters expressly reserved from consideration of the cross-motions for summary judgment on the consolidated issues.

Both the district court and the court of appeals concluded that the Secretary had authority to redetermine residence for purposes of village eligibility. (A. 56, 89).

In this petition for certiorari, petitioners seek review of the appellate court's decision with respect to (1) standing, (2) the remedy fashioned by the district court, (3) the authority of the Secretary to redetermine residence for purposes of village eligibility, and (4) the propriety of the appellate court's remand order in the case of Salamatof Village where dispositive issues had not yet been reached by the district court.

REASONS FOR GRANTING THE WRIT

On December 18, 1971 the Congress of the United States honored a commitment, made nearly a century before, to provide legislation to enable Alaska Natives to receive title to lands of this vast territory they had long occupied.[18] Through the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601 *et seq.*, Congress finally settled the century-old claims of Alaska Natives by providing land and cash to Native Alaskans, in the main through the village and regional corporations established pursuant to the Act. At the same time, however, Congress extinguished *all* aboriginal titles and claims and, in sharp contrast to the immediate extinguishment of all claims, established

[18] *See* Act of May 17, 1884, 23 Stat. 24. *See also*, Treaty of March 30, 1867, 15 Stat. 539; Act of March 3, 1891, §§ 12 and 14, 26 Stat. 1095, 1100; Act of May 14, 1898, § 10, 30 Stat. 409, 413; Act of June 6, 1970, § 27, 31 Stat. 321, 330; Act of May 17, 1906, 34 Stat. 197; Act of May 25, 1926, 44 Stat. 629.

strict procedures by which Alaska Natives could realize their heritage.

The Secretary of the Interior's determination of Native residence and village eligibility is at the core of Congress' purpose to accomplish, through ANCSA, a "fair and just" settlement of Native claims "rapidly and with certainty." 43 U.S.C. § 1601(b). For unless entitlements are established in compliance with the Act's strict procedures, Natives as members of Native village corporations receive nothing for the extinguishment of their claims.

Through these provisions of ANCSA, it is in the power of the Secretary not only to determine whether Native entities obtain the benefits to which the Natives' tradition entitles them but, in so doing, to determine how and to whom forty million acres of public lands in the State of Alaska and almost a billion dollars in cash are to be distributed.

Thus, the Secretary's determinations regarding residence and village eligibility are of tremendous importance to the future development of the State of Alaska. And these decisions, while made pursuant to ANCSA, impact as well upon the administration of the Statehood Act,[19] the utilization of public lands, and upon people to whom the United States owes a special duty of trust. *See Choate* v. *Trapp,* 224 U.S. 665 (1912).

[19] The decision of the Secretary impacts upon the administration of the Alaska Statehood Act, 48 U.S.C. Prec. § 21, 72 Stat. 339, as amended, because substantial acreages of lands conveyed to Native entities under ANCSA are withdrawn from selection by (and in some cases taken from selections of) the State of Alaska.

A Writ of Certiorari has frequently been found appropriate in cases involving such significant issues. *See, e.g., United States* v. *Ruzicka,* 329 U.S. 287 (1946) (significance of the issue in the administration of the statute); *United States* v. *Coleman,* 390 U.S. 599, 601 (1968) (importance of the decision to the utilization of public lands). *See also, Alaska* v. *American Can Co.,* 358 U.S. 224, 225 (1959) (certiorari granted "in view of the fiscal importance of the question to Alaska . . ."); *United States* v. *Zazove,* 334 U.S. 602, 613-14, n. 17 (1948) (statutory construction issue involved billions of dollars).

Because of the importance of the responsibilities of the Secretary which flow from ANCSA and its administration, it is critical to the proper administration of the Act that the Secretary act lawfully and that any departure from lawful conduct be remedied in light of the policies of the Act and in such a way as to protect against the possibility of repetition.

Both the district court and the court of appeals concluded that the actions of the Secretary, with respect to these villages, was unlawful.[20] However, the courts differed significantly in the relief to be accorded. The court of appeals directed that the question of the eligibility of these villages for benefits under the Act be remanded to the Secretary. The district court, however, had concluded that this traditional remedy could not be applied for two independent rea-

[20] Both courts agreed that the secrecy imposed by the Secretary upon the second and third tier of the administrative proceedings violated due process and that these proceedings were impermissibly influenced by the interference of a Congressional Committee (A. 84, 86, 54, 55).

sons. One reason was because the taint of improper Congressional interference continued to linger. The second reason was because the delay incumbent in a remand would frustrate the purposes of the Act. The district court carefully balanced the rights and interests of the parties before it, concluding:

> There is nothing before the Court to indicate that the effect of the Dingell hearings has been removed, and they did not occur so long ago that their influence can be presumed to have been dissipated. For this Court to allow further administrative proceedings to be held when the agency has failed to demonstrate the absence of any lingering effect would be to countenance a continuing violation of due process. Apart from this, Congress has been insistent, and properly so, upon a prompt resolution and settlement of the Natives' claims. Key deadlines still must be met by December of this year and the general purpose of the statute would be thwarted by the delays inherent in a remand, ...
>
> *Koniag, Inc.* v. *Kleppe,* 405 F. Supp. 1360 at 1372.

In contrast, the remand directed by the court of appeals creates the kind of delay Congress sought to avoid. The sole basis for the appellate court's conclusion was its own inference that the intervention of time had purged the possibility of interference. This not only conflicts with the facts,[21] it constitutes an unwarranted intrusion into the discretion of the district court. *See Lemon* v. *Kurtzman,* 411 U.S. 192 (1973); *United States* v. *Singer Mfg. Co.,* 374 U.S. 174 (1963) (in fashioning constitutional remedy district court has wide discretion that will be disturbed on appeal of federal rules of procedure).

[21] At the time this case was before the court of appeals, many of the principal participants were still serving in the Department of Interior and in ANCAB. Moreover, the ANCSA land selection regulations had been amended, 41 Fed. Reg. 14734, *et seq.* (April 7, 1976), imposing more restrictive tests, over the vigorous objection of the Alaska Natives, upon the "group" eligibility determination than upon villages. Brief for Appellees at 48-52. ANCSA § 3, 43 U.S.C. § 1602(d), defines a "group" similarly to a "village" except for the requirement of 25 residents. The change in the regulations prescribing more stringent criteria for "groups" may well preclude these village petitioners from now qualifying for the lesser benefits accorded "groups" under ANCSA § 14(h)(2), 43 U.S.C. § 1613(h)(2).

Moreover, the court of appeals ignored the second independent ground upon which the district court reinstated the BIA's decisions of eligibility—the Congressional command for prompt action.

Certiorari should be granted for these reasons alone. This Court has both the responsibility to mark the appropriate limits of the investigating power of Congressional committees and to assure the proper functioning of the federal judiciary. Both are appropriate grounds for the issuance of a writ of certiorari. *See, e.g., Watkins* v. *United States,* 354 U.S. 178, 187 (1957); *United States* v. *Rumely,* 345 U.S. 41, 42 (1953), (court circumscribed committee inquiries); *Hickman* v. *Taylor,* 329 U.S. 495 (1947), (construction of federal rules of procedure).

Further, in promulgating the village eligibility regulations, the Secretary chose to apply the term "aggrieved party" to those persons from whom a petition would lie. It is beyond cavil that the term "aggrieved party" is a term of art with a precise, technical meaning. *See, e.g., United States* v. *SCRAP,* 412 U.S. 669 (1973); *Sierra Club* v. *Morton,* 405 U.S. 727 (1972);

Association of Data Processing Service Organizations v. *Camp,* 397 U.S. 150 (1970), (all construing 5 U.S.C. § 702). And, it must be presumed that the Secretary acted from knowledge and not ignorance of the meaning of these words.

Expressly refusing to apply the judicial concept of standing, the court of appeals reversed the district court's holding that the administrative appellants lacked standing to appeal to the Secretary from the BIA's favorable determinations of the eligibility of Anton Larsen Bay, Bells Flats, Alexander Creek and Solomon.

In the cases of Alexander Creek and Solomon, the court of appeals described the interest of the State of Alaska as "conjectural at best". (A. 50). Such an interest would not confer standing under this Court's decisions cited above.

In the cases of Anton Larsen Bay and Bells Flats, the court of appeals relied on a "domino theory" that if these villages did not take land from the Wildlife Refuge or National Forest other villages *might* select more land therefrom. (A. 47, 48). But the testimony cited by the ALJ upon which the Secretary and the courts of appeals relied is on its face speculative. (A. 338-40, 341-43). The court of appeals allowed standing on the basis of the "ingenious academic exercise in the conceivable" denounced in *SCRAP,* 412 U.S. at 688.

It may well be that the court of appeals was correct, as a general proposition, that administrative standing and judicial standing are not interchangeable. *But see National Welfare Rights Organization* v. *Finch,* 429 F.2d 725 (D.C. Cir. 1970); *United Church of Christ* v. *FCC,* 359 F.2d 994 (D.C. Cir. 1966). But

that is hardly relevant where, as here, the Secretary has, by his own regulations, bound himself to the judicial standard. Having imposed by regulation the judicial standing requirement, he cannot thereafter deprive that standard of vitality by a *post hoc* definition which grants to the most speculative interest a roving right to protest.

This is particularly so in a case involving Native rights. For this Court has consistently ruled that in construing a statute intended to benefit Natives, questions should be resolved in favor of the Natives. *Choate* v. *Trapp,* 224 U.S. 665 (1912).[22]

Accordingly, the decision of the court of appeals is worthy of review because it is contrary in principle to the precedents established by this Court and those followed by other circuits with respect to the binding effect of regulations[23] as well as the benefit owing to Natives as a result of the trust responsibility of the United States.[24]

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[22] The principle adopted in *Choate* has been frequently followed. *E.g.*, McClanahan v. State Tax Commissioner, 411 U.S. 164 (1973); Squire v. Capoeman, 351 U.S. 1 (1956); United States v. Santa Fe Pacific R.R., 314 U.S. 339 (1941); Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918).

[23] *E.g.*, United States v. Nixon, 418 U.S. 683, 695-96 (1974); Vitarelli v. Seaton, 359 U.S. 535 (1959); United States v. Leahey, 434 F.2d 7 (1st Cir. 1970); Archambault v. United States, 224 F.2d 925 (10th Cir. 1955); Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676 (9th Cir. 1949).

[24] *E.g.*, Bryan v. Itasca County, 426 U.S. 373, 392 (1976); Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971), and cases cited in n.18, *supra*. Unlike Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 n.7 (1976), this is not a dispute between two contending groups of Natives. While eligibility of the petitioning villages would reduce the amount of land to be distributed as "second round" selections under ANCSA section 12(b), 43 U.S.C. § 1611

As can be seen from the above, as well as an examination of the statute itself, the provisions of ANCSA are complex and interrelated. Just as land conveyances under ANCSA turn upon the eligibility of villages, the eligibility of villages turns upon the Secretary's determination of each Native's place of residence. Section 5(a), 43 U.S.C. § 1604(a), gives the Secretary two years (*i.e.*, to December 18, 1973) to prepare a roll of all eligible Natives. That roll must show the residence of each enrolled Native on the 1970 census enumeration date (April 1, 1970), "*and [each Native] shall be enrolled according to such residence.*" 43 U.S.C. § 1604(b) (emphasis supplied).

Here, after having determined each Native's residence for purposes of enrollment, the Secretary granted himself the privilege in some instances of redetermining that residence for purposes of village eligibility. This is the only instance in which the Secretary has departed from the use of enrollment residence for other purposes of the Act. It results in the anamolous situation of some Natives having two "residences" for purposes of ANCSA.

That a Native can have only one residence follows from the time sequence for ANCSA's implementation. First, by December 18, 1973 the Secretary was

(b), under which the difference between the total section 12(a), 43 U.S.C. § 1611(a), land entitlements of eligible villages and 22,000,000 acres are to be allocated among eleven of the Alaska Native regional corporations for reallocation to eligible village corporations, no regional or village corporation protested the eligibility of these villages in the administrative proceedings or sought to intervene below. All regional corporations were given express notice of the BIA's initial proposed decisions of eligibility. 43 C.F.R. §§ 2651.2(a)(2), (8).

to determine who was a Native and where that Native resided. An additional six months (*i.e.*, through June 18, 1974) is allowed for the determination of village eligibility. 43 U.S.C. §§ 1610(b)(2) and (3). Village corporations (which, of course, had to be organized in the meantime by the "residents" of the villages) are allowed an additional six months (or through December 17, 1974) in which to make their land selections. 43 U.S.C. § 1611(a)(1). Regional corporation selections must be completed by no later than one additional year (*i.e.*, December 17, 1975). 43 U.S.C. § 1611(e)(3). December 17, 1974 is also the date upon which the withdrawals for Native selections lapse, except as to village, regional, or group selections which are continued until the land is conveyed. 43 U.S.C. § 1621(h)(2). Such a schedule could not be met were residency open to continuing redetermination.

Clearly, Congress could not have intended that the same Native could have different residences on April 1, 1970 for different ANCSA purposes. Yet both the district court and court of appeals approved exactly such a result.

Because so much turns upon the Secretary's determinations with regard to residence, resolution of this issue is also of vital importance to the administration of ANCSA. This issue also presents to this Court significant questions regarding the authority of the Secretary to alter or amend the Native Roll in any way to the prejudice of petitioners after the statutory deadline for certification of the Roll has passed. *See Choctaw Nation* v. *United States*, 100 F. Supp. 318 (Ct. Cl., 1941), *cert. denied*, 343 U.S. 956 (1952). *Cf. Unit-*

ed States ex rel Lowe v. *Fisher,* 223 U.S. 95, 106-107 (1912). On this issue there is an obvious conflict between the United States Court of Claims and the court of appeals for the District of Columbia.

As to petitioner Salamatof, the court of appeals exceeded its authority in a way not present in any of the other cases. In so doing, it effectively denied to this petitioner its right to full, proper and meaningful judicial review.

As expressly noted in the district court opinion, (A. 70), the case as decided by the district court in cross motions for summary judgment dealt only with a *portion* of the administrative appeals, namely, those issues common to two or more plaintiff villages. *Expressly reserved* were issues in any particular case *not* "common" to the others; and as to Salamatof, its unique facts permit and indeed require full and final determination of its case by the district court, at this juncture, without further remand to the Secretary's administrative process. Salamatof's attempt to revive these "non-common" grounds in the district court, following the appellate court's reversal of the reinstatement remedy, was, however, seen by the lower court as blocked by the appellate court's mandate.

Thus Salamatof, which believes it can establish, on the present record, its lawful entitlement to village eligibility status, is relegated to yet another year or more of further and pointless administrative proceedings—in all predictability, only to reach the same predetermined end at the hands of the Secretary (a reaffirmance of the previous finding of ineligibility) and the consequent necessity of yet another judicial appeal.

The Administrative Procedure Act, 5 U.S.C. § 706, compels a reversal of this bizarre result. That section requires, in pertinent part, that: "To the extent necessary to decision and when presented, the reviewing court shall decide *all* relevant questions of law. . . ." (emphasis added). Where the reviewing authority of a court is properly invoked by an aggrieved party, it is the duty of the court to review the action of the agency. *Dorsey* v. *Kingsland,* 173 F.2d 405, 410 (D.C. Cir.), *rev. on other grounds,* 338 U.S. 318 (1949); *American Airlines, Inc.* v. *C.A.B.,* 231 F.2d 483, 486 (1956).

Salamatof has properly invoked the jurisdiction of the district court and is entitled to an adjudication of *"all"* the relevant issues raised before that court.

The unexplained refusal of the court of appeals to acknowledge and permit this result was a fundamental denial of Salamatof's statutory and constitutional due process rights, and so wholly arbitrary and in excess of the court of appeals' lawful powers as to require correction by this Court.

In summation, each of the four questions presented for review present significant issues of national importance with respect to the administration of ANCSA, the utilization of public lands, the authority of the Secretary, and the fulfillment of the fiduciary obligations of the United States. This case also raises questions regarding the proper scope of Congressional oversight of administrative functions and the role of appellate courts in supervising matters within the discretion of federal district courts.

In passing upon such questions below, the court of appeals, in particular, departed from well established

principles of both this Court and the courts of appeals for other circuits, as well as the United States Court of Claims.

CONCLUSION

For these reasons, petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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APPENDIX

APPENDIX A

ALASKA NATIVE CLAIMS SETTLEMENT ACT
PUBLIC LAW 92-203; 85 STAT. 688

[H. R. 10367]

An Act to provide for the settlement of certain land claims of Alaska Natives, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

This Act may be cited as the "Alaska Native Claims Settlement Act".

DECLARATION OF POLICY

43 U.S.C. § 1601

Sec. 2. Congress finds and declares that—

(a) there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims;

(b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska;

(c) no provision of this Act shall replace or diminish any right, privilege, or obligation of Natives as citizens of the United States or of Alaska, or relieve, replace, or diminish any obligation of the United States or of the

State of Alaska to protect and promote the rights or welfare of Natives as citizens of the United States or of Alaska; the Secretary is authorized and directed, together with other appropriate agencies of the United States Government, to make a study of all Federal programs primarily designed to benefit Native people and to report back to the Congress with his recommendations for the future management and operation of these programs within three years of the date of enactment of this Act;

(d) no provision of this Act shall constitute a precedent for reopening, renegotiating, or legislating upon any past settlement involving land claims or other matters with any Native organizations, or any tribe, band, or identifiable group of American Indians;

(e) no provision of this Act shall effect a change or changes in the petroleum reserve policy reflected in sections 7421 through 7438 of title 10 of the United States Code except as specifically provided in this Act;

(f) no provision of this Act shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, nor to grant implied consent to Natives to sue the United States or any of its officers with respect to the claims extinguished by the operation of this Act; and

(g) no provision of this Act shall be construed to terminate or otherwise curtail the activities of the Economic Development Administration or other Federal agencies conducting loan or loan and grant programs in Alaska. For this purpose only, the terms "Indian reservation" and "trust or restricted Indian-owned land areas" in Public Law 89-136, the Public Works and Economic Development Act of 1965, as amended, shall be interpreted to include lands granted to Natives under this Act as long as such lands remain in the ownership of the Native villages or the Regional Corporations.

DEFINITIONS

43 U.S.C. § 1602

Sec. 3. For the purposes of this Act, the term—

(a) "Secretary" means the Secretary of the Interior;

(b) "Native" means a citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community) Eskimo, or Aleut blood, or combination thereof. The term includes any Native as so defined either or both of whose adoptive parents are not Natives. It also includes, in the absence of proof of a minimum blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any village or group. Any decision of the Secretary regarding eligibility for enrollment shall be final;

(c) "Native village" means any tribe, band, clan, group, village, community, or association in Alaska listed in sections 11 and 16 of this Act, or which meets the requirements of this Act, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives;

(d) "Native group" means any tribe, band, clan, village, community, or village association of Natives in Alaska composed of less than twenty-five Natives, who comprise a majority of the residents of the locality;

(e) "Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the

State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969;

(f) "State" means the State of Alaska;

(g) "Regional Corporation" means an Alaska Native Regional Corporation established under the laws of the State of Alaska in accordance with the provisions of this Act;

(h) "Person" means any individual, firm, corporation, association, or partnership;

(i) "Municipal Corporation" means any general unit of municipal government under the laws of the State of Alaska;

(j) "Village Corporation" means an Alaska Native Village Corporation organized under the laws of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of a Native village in accordance with the terms of this Act.

(k) "Fund" means the Alaska Native Fund in the Treasury of the United States established by section 6; and

(*l*) "Planning Commission" means the Joint Federal-State Land Use Planning Commission established by section 17.

DECLARATION OF SETTLEMENT

43 U.S.C. § 1603

Sec. 4, (a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

(b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

(c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

ENROLLMENT

43 U.S.C. § 1604

Sec. 5. (a) The Secretary shall prepare within two years from the date of enactment of this Act a roll of all Natives who were born on or before, and who are living on, the date of enactment of this Act. Any decision of the Secretary regarding eligibility for enrollment shall be final.

(b) The roll prepared by the Secretary shall show for each Native, among other things, the region and the village or other place in which he resided on the date of the 1970 census enumeration, and he shall be enrolled according to such residence. Except as provided in subsection (c), a Native eligible for enrollment who is not, when the roll is prepared, a permanent resident of one of the twelve regions established pursuant to subsection 7(a) shall be enrolled by the Secretary in one of the twelve regions, giving priority in the following order to—

(1) the region where the Native resided on the 1970 census date if he had resided there without substantial interruption for two or more years;

(2) the region where the Native previously resided for an aggregate of ten years or more;

(3) the region where the Native was born; and

(4) the region from which an ancestor of the Native came:

The Secretary may enroll a Native in a different region when necessary to avoid enrolling members of the same family in different regions or otherwise avoid hardships.

(c) A Native eligible for enrollment who is eighteen years of age or older and is not a permanent resident of one of the twelve regions may, on the date he files an application for enrollment, elect to be enrolled in a thirteenth region for Natives who are non-residents of Alaska, if such region is established pursuant to subsection 7(c). If such region is not established, he shall be enrolled as provided in subsection (b). His election shall apply to all dependent members of his household who are less than eighteen years of age, but shall not affect the enrollment of anyone else.

ALASKA NATIVE FUND

43 U.S.C. § 1605

Sec. 6. (a) There is hereby established in the United States Treasury an Alaska Native Fund into which the following moneys shall be deposited:

(1) $462,500,000 from the general fund of the Treasury, which are authorized to be appropriated according to the following schedule:

(A) $12,500,000 during the fiscal year in which this Act becomes effective;

(B) $50,000,000 during the second fiscal year;

(C) $70,000,000 during each of the third, fourth, and fifth fiscal years;

(D) $40,000,000 during the sixth fiscal year; and

(E) $30,000,000 during each of the next five fiscal years.

(2) Four percent interest per annum, which is authorized to be appropriated, on any amount authorized to be appropriated by this paragraph that is not appropriated within six months after the fiscal year in which payable.

(3) $500,000,000 pursuant to the revenue sharing provisions of section 9.

(b) None of the funds paid or distributed pursuant to this section to any of the Regional and Village Corporations established pursuant to this Act shall be expended, donated, or otherwise used for the purpose of carrying on propaganda, or intervening in (including the publishing and distributing of statements) any political campaign on behalf of any candidate for public office. Any person who willfully violates the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000 or imprisoned not more than twelve months, or both.

(c) After completion of the roll prepared pursuant to section 5, all money in the Fund, except money reserved as provided in section 20 for the payment of attorney and other fees, shall be distributed at the end of each three months of the fiscal year among the Regional Corporations organized pursuant to section 7 on the basis of the relative numbers of Natives enrolled in each region. The share of a Regional Corporation that has not been organized shall be retained in the Fund until the Regional Corporation is organized.

REGIONAL CORPORATIONS

43 U.S.C. § 1606

Sec. 7. (a) For purposes of this Act, the State of Alaska shall be divided by the Secretary within one year after the date of enactment at this Act into twelve geographic regions, with each region composed as far as practicable of Natives having a common heritage and sharing common interests. In the absence of good cause shown to the contrary, such regions shall approximate the areas covered by the operations of the following existing Native associations:

(1) Aretic Slope Native Association (Barrow, Point Hope);

(2) Bering Straits Association (Seward Peninsula, Unalakleet, Saint Lawrence Island);

(3) Northwest Alaska Native Association (Kotzebue);

(4) Association of Village Council Presidents (southwest coast, all villages in the Bethel area, including all villages on the Lower Yukon River and the Lower Kuskokwim River);

(5) Tanana Chiefs' Conference (Koyukuk, Middle and Upper Yukon Rivers, Upper Kuskokwim, Tanana River);

(6) Cook Inlet Association (Kenai, Tyonek, Eklutna, Iliamna);

(7) Bristol Bay Native Association (Dillingham, Upper Alaska Peninsula);

(8) Aleut League (Aleutian Islands, Pribilof Islands and that part of the Alaska Peninsula which is in the Aleut League);

(9) Chugach Native Association (Cordova Tatitlek, Port Graham, English Bay, Valdez, and Seward);

(10) Tlingit-Haida Central Council (southeastern Alaska, including Metlakatla);

(11) Kodiak Area Native Association (all villages on and around Kodiak Island); and

(12) Copper River Native Association (Copper Center, Glennallen, Chitina, Mentasta).

Any dispute over the boundaries of a region or regions shall be resolved by a board of arbitrators consisting of one person selected by each of the Native associations involved, and an additional one or two persons, whichever is needed to make an odd number of arbitrators, such additional person or persons to be selected by the arbitrators selected by the Native associations involved.

(b) The Secretary may, on request made within one year of the date of enactment of this Act, by representative and responsible leaders of the Native associations listed in subsection (a), merge two or more of the twelve regions: *Provided*, That the twelve regions may not be reduced to less than seven, and there may be no fewer than seven Regional Corporations.

(c) If a majority of all eligible Natives eighteen years of age or older who are not permanent residents of Alaska elect, pursuant to subsection 5(c), to be enrolled in a thirteenth region for Natives who are non-residents of Alaska, the Secretary shall establish such a region for the benefit of the Natives who elected to be enrolled therein, and they may establish a Regional Corporation pursuant to this Act.

(d) Five incorporators within each region, named by the Native association in the region, shall incorporate under the laws of Alaska a Regional Corporation to conduct business for profit, which shall be eligible for the benefits

of this Act so long as it is organized and functions in accordance with this Act. The articles of incorporation shall include provisions necessary to carry out the terms of this Act.

(e) The original articles of incorporation and bylaws shall be approved by the Secretary before they are filed, and they shall be submitted for approval within eighteen months after the date of enactment of this Act. The articles of incorporation may not be amended during the Regional Corporation's first five years without the approval of the Secretary. The Secretary may withhold approval under this section if in his judgment inequities among Native individuals or groups of Native individuals would be created.

(f) The management of the Regional Corporation shall be vested in a board of directors, all of whom, with the exception of the initial board, shall be stockholders over the age of eighteen. The number, terms, and method of election of members of the board of directors shall be fixed in the articles of incorporation or bylaws of the Regional Corporation.

(g) The Regional Corporation shall be authorized to issue such number of shares of common stock, divided into such classes of shares as may be specified in the articles of incorporation to reflect the provisions of this Act, as may be needed to issue one hundred shares of stock to each Native enrolled in the region pursuant to section 5.

(h) (1) Except as otherwise provided in paragraph (2) of this subsection, stock issued pursuant to subsection (g) shall carry a right to vote in elections for the board of directors and on such other questions as properly may be presented to stockholders, shall permit the holder to receive dividends or other distributions from the Regional Corporation, and shall vest in the holder all rights of a stockholder in a business corporation organized under the laws of the State of Alaska, except that for a period of

twenty years after the date of enactment of this Act the stock, inchoate rights thereto, and any dividends paid or distributions made with respect thereto may not be sold, pledged, subjected to a lien or judgment execution, assigned in present or future, or otherwise alienated: *Provided*, That such limitation shall not apply to transfers of stock pursuant to a court decree of separation, divorce or child support.

(2) Upon the death of any stockholder, ownership of such stock shall be transferred in accordance with his last will and testament or under the applicable laws of intestacy, except that (A) during the twenty-year period after the date of enactment of this Act such stock shall carry voting rights only if the holder thereof through inheritance also is a Native, and (B), in the event the deceased stockholder fails to dispose of his stock by will and has no heirs under the applicable laws of intestacy, such stock shall escheat to the Regional Corporation.

(3) On January 1 of the twenty-first year after the year in which this Act is enacted, all stock previously issued shall be deemed to be canceled, and shares of stock of the appropriate class shall be issued without restrictions required by this Act to each stockholder share for share.

(i) Seventy per centum of all revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this Act shall be divided annually by the Regional Corporation among all twelve Regional Corporations organized pursuant to this section according to the number of Natives enrolled in each region pursuant to section 5. The provisions of this subsection shall not apply to the thirteenth Regional Corporation if organized pursuant to subsection (c) hereof.

(j) During the five years following the enactment of this Act, not less than 10% of all corporate funds received by each of the twelve Regional Corporations under section 6 (Alaska Native Fund), and under subsection (i) (revenues

from the timber resources and subsurface estate patented to it pursuant to this Act), and all other net income, shall be distributed among the stockholders of the twelve Regional Corporations. Not less than 45% of funds from such sources during the first five-year period, and 50% thereafter, shall be distributed among the Village Corporations in the region and the class of stockholders who are not residents of those villages, as provided in subsection to it. [sic] In the case of the thirteenth Regional Corporation, if organized, not less than 50% of all corporate funds received under section 6 shall be distributed to the stockholders.

(k) Funds distributed among the Village Corporations shall be divided among them according to the ratio that the number of shares of stock registered on the books of the Regional Corporation in the names of residents of each village bears to the number of shares of stock registered in the names of residents in all villages.

(*l*) Funds distributed to a Village Corporation may be withheld until the village has submitted a plan for the use of the money that is satisfactory to the Regional Corporation. The Regional Corporation may require a village plan to provide for joint ventures with other villages, and for joint financing of projects undertaken by the Regional Corporation that will benefit the region generally. In the event of disagreement over the provisions of the plan, the issues in disagreement shall be submitted to arbitration, as shall be provided for in the articles of incorporation of the Regional Corporation.

(m) When funds are distributed among Village Corporations in a region, an amount computed as follows shall be distributed as dividends to the class of stockholders who are not residents of those villages: The amount distributed as dividends shall bear the same ratio to the amount distributed among the Village Corporations that the number of shares of stock registered on the books of the Regional Corporation in the names of nonresidents of villages bears

to the number of shares of stock registered in the names of village residents: *Provided,* That an equitable portion of the amount distributed as dividends may be withheld and combined with Village Corporation funds to finance projects that will benefit the region generally.

(n) The Regional Corporation may undertake on behalf of one or more of the Village Corporations in the region any project authorized and financed by them.

(*o*) The accounts of the Regional Corporation shall be audited annually in accordance with generally accepted auditing standards by independent certified public accountants or independent licensed public accountants, certified or licensed by a regulatory authority of the State or the United States. The audits shall be conducted at the place or places where the accounts of the Regional Corporation are normally kept. All books, accounts, financial records, reports, files, and other papers, things, or property belonging to or in use by the Regional Corporation and necessary to facilitate the audits shall be available to the person or persons conducting the audits; and full facilities for verifying transactions with the balances or securities held by depositories, fiscal agent, and custodians shall be afforded to such person or persons. Each audit report or a fair and reasonably detailed summary thereof shall be transmitted to each stockholder, to the Secretary of the Interior and to the Committees on Interior and Insular Affairs of the Senate and the House of Representatives.

(p) In the event of any conflict between the provisions of this section and the laws of the State of Alaska, the provisions of this section shall prevail.

(q) Two or more Regional Corporations may contract with the same business management group for investment services and advice regarding the investment of corporate funds.

VILLAGE CORPORATIONS

43 U.S.C. § 1607

Sec. 8. (a) The Native residents of each Native village entitled to receive lands and benefits under this Act shall organize as a business for profit or nonprofit corporation under the laws of the State before the Native village may receive patent to lands or benefits under this Act, except as otherwise provided.

(b) The initial articles of incorporation for each Village Corporation shall be subject to the approval of the Regional Corporation for the region in which the village is located. Amendments to the articles of incorporation and the annual budgets of the Village Corporations shall, for a period of five years, be subject to review and approval by the Regional Corporation. The Regional Corporation shall assist and advise Native villages in the preparation of articles of incorporation and other documents necessary to meet the requirements of this subsection.

(c) The provisions concerning stock alienation, annual audit, and transfer of stock ownership on death or by court decree provided for Regional Corporations in section 7 shall apply to Village Corporations except that audits need not be transmitted to the Committees on Interior and Insular Affairs of the Senate and the House of Representatives.

* * * *

STATUTE OF LIMITATIONS

43 U.S.C. § 1609

Sec. 10. (a) Notwithstanding any other provision of law, any civil action to contest the authority of the United States to legislate on the subject matter or the legality of this Act shall be barred unless the complaint is filed within one year of the date of enactment of this Act, and no such action shall be entertained unless it is commenced by a duly

authorized official of the State. Exclusive jurisdiction over such action is hereby vested in the United States District Court for the District of Alaska. The purpose of this limitation on suits is to insure that, after the expiration of a reasonable period of time, the right, title, and interest of the United States, the Natives, and the State of Alaska will vest with certainty and finality and may be relied upon by all other persons in their relations with the State, the Natives, and the United States.

(b) In the event that the State initiates litigation or voluntarily becomes a party to litigation to contest the authority of the United States to legislate on the subject matter or the legality of this Act, all rights of land selection granted to the State by the Alaska Statehood Act shall be suspended as to any public lands which are determined by the Secretary to be potentially valuable for mineral development, timber, or other commercial purposes, and no selections shall be made, no tentative approvals shall be granted, and no patents shall be issued for such lands during the pendency of such litigation. In the event of such suspension, the State's right of land selection pursuant to section 6 of the Alaska Statehood Act shall be extended for a period of time equal to the period of time the selection right was suspended.

WITHDRAWAL OF PUBLIC LANDS

43 U.S.C. § 1610

Sec. 11. (a) (1) The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, as amended:

(A) The lands in each township that encloses all or part of any Native village identified pursuant to subsection (b);

(B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and

(C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection.

The following lands are excepted from such withdrawal: lands in the National Park System and lands withdrawn or reserved for national defense purposes other than Naval Petroleum Reserve Numbered 4.

(2) All lands located within the townships described in subsection (a) (1) hereof that have been selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from the creation of third party interests by the State under the Alaska Statehood Act.

(3) (A) If the Secretary determines that the lands withdrawn by subsections (a) (1) and (2) hereof are insufficient to permit a Village or Regional Corporation to select the acreage it is entitled to select, the Secretary shall withdraw three times the deficiency from the nearest unreserved, vacant and unappropriated public lands. In making this withdrawal the Secretary shall, insofar as possible, withdraw public lands of a character similar to those on which the village is located and in order of their proximity to the center of the Native village: *Provided,* That if the Secretary, pursuant to section 17, and 22(e) determines there is a need to expand the boundaries of a National Wildlife Refuge to replace any acreage selected in the Wildlife Refuge System by the Village Corporation the withdrawal under this section shall not include lands in the Refuge.

(B) The Secretary shall make the withdrawal provided for in subsection (3) (A) hereof on the basis of the best available information within sixty days of the date of enactment of this Act, or as soon thereafter as practicable.

(b) (1) The Native villages subject to this Act are as follows:

NAME OF PLACE AND REGION

Afognak, Afognak Island.
Akhiok, Kodiak.
Akiachak, Southwest Coastal Lowland.
Akiak, Southwest Coastal Lowland.
Akutan, Aleutian.
Alakanuk, Southwest Coastal Lowland.
Alatna, Koyukuk-Lower Yukon.
Aleknagik, Bristol Bay.
Allakaket, Koyukuk-Lower Yukon.
Ambler, Bering Strait.
Anaktuvuk Pass, Arctic Slope.
Andreafsey, Southwest Coastal Lowland.
Aniak, Southwest Coastal Lowland.
Anvik, Koyukuk-Lower Yukon.
Arctic Village, Upper Yukon-Porcupine.
Atka, Aleutian.
Atkasook, Arctic Slope.
Atmautluak, Southwest Coastal Lowland.
Barrow, Arctic Slope.
Beaver, Upper Yukon-Porcupine.
Belkofsky, Aleutian.
Bethel, Southwest Coastal Lowland.
Bill Moore's Southwest Coastal Lowland.
Biorka, Aleutian.
Birch Creek, Upper Yukon-Porcupine.
Brevig Mission, Bering Strait.
Buckland, Bering Strait.
Candle, Bering Strait.
Cantwell, Tanana.

Canyon Village, Upper Yukon-Porcupine.
Chalkyitsik, Upper Yukon-Porcupine.
Chanilut, Southwest Coastal Lowland.
Cherfornak, Southwest Coastal Lowland.
Chevak, Southwest Coastal Lowland.
Chignik, Kodiak.
Chignik Lagoon, Kodiak.
Chignik Lake, Kodiak.
Chistochina, Copper River.
Chitina, Copper River.
Chukwuktoligamute, Southwest Coastal Lowland.
Circle, Upper Yukon-Porcupine.
Clark's Point, Bristol Bay.
Copper Center, Copper River.
Crooked Creek, Upper Kuskokwim.
Kwethluk, Southwest Coastal Lowland.
Kwigillingok, Southwest Coastal Lowland.
Larsen Bay, Kodiak.
Levelock, Bristol Bay.
Lime Village, Upper Kuskokwim.
Lower Kalskag, Southwest Coastal Lowland.
McGrath, Upper Kuskokwim.
Makok, Koyukuk-Lower Yukon.
Manley Hot Springs, Tanana.
Manokotak, Bristol Bay.
Marshall, Southwest Coastal Lowland.
Mary's Igloo, Bering Strait.
Medfra, Upper Kuskokwim.
Mekoryuk, Southwest Coastal Lowland.
Mentasta Lake, Copper River.
Minchumina Lake, Upper Kuskokwim
Minto, Tanana.
Mountain Village, Southwest Coastal Lowland.
Nabesna Village, Tanana.
Naknek, Bristol Bay.
Napaimute, Upper Kuskokwim.
Napakiak, Southwest Coastal Lowland.

Napaskiak, Southwest Coastal Lowland.
Nelson Lagoon, Aleutian.
Nenana, Tanana.
Newhalen, Cook Inlet.
New Stuyahok, Bristol Bay.
Newtok, Southwest Coastal Lowland.
Nightmute, Southwest Coastal Lowland.
Nikolai, Upper Kuskokwim.
Nikolski, Aleutian.
Ninilchik, Cook Inlet.
Noatak, Bering Strait.
Nome, Bering Strait.
Nondalton, Cook Inlet.
Nooiksut, Arctic Slope.
Noorvik, Bering Strait.
Northeast Cape, Bering Sea.
Northway, Tanana.
Nulato, Koyukuk-Lower Yukon.
Nunapitchuk, Southwest Coastal Lowland.
Ohogamiut, Southwest Coastal Lowland.
Old Harbor, Kodiak.
Oscarville, Southwest Coastal Lowland.
Ouzinkie, Kodiak.
Paradise, Koyukuk-Lower Yukon.
Pauloff Harbor, Aleutian.
Pedro Bay, Cook Inlet
Perryville, Kodiak.
Deering, Bering Strait.
Dillingham, Bristol Bay.
Dot Lake, Tanana.
Eagle, Upper Yukon-Porcupine.
Eek, Southwest Coastal Lowland.
Egegik, Bristol Bay.
Eklutna, Cook Inlet.
Ekuk, Bristol Bay.

Ekwok, Bristol Bay.
Elim, Bering Strait.
Emmonak, Southwest Coastal Lowland.
English Bay, Cook Inlet.
False Pass, Aleutian.
Fort Yukon, Upper Yukon-Porcupine.
Gakona, Copper River.
Galena, Koyukuk-Lower Yukon.
Gambell, Bering Sea.
Georgetown, Upper Kuskokwim.
Golovin, Bering Strait.
Goodnews Bay, Southwest Coastal Lowland.
Grayling, Koyukuk-Lower Yukon.
Gulkana, Copper River.
Hamilton, Southwest Coastal Lowland.
Holy Cross, Koyukuk-Lower Yukon.
Hooper Bay, Southwest Coastal Lowland.
Hughes, Koyukuk-Lower Yukon.
Huslia, Koyukuk-Lower Yukon.
Igiugig, Bristol Bay.
Iliamna, Cook Inlet.
Inalik, Bering Strait.
Ivanof Bay, Aleutian.
Kaguyak, Kodiak.
Kaktovik, Arctic Slope.
Kalskag, Southwest Coastal Lowland.
Kaltag, Koyukuk-Lower Yukon.
Karluk, Kodiak.
Kasigluk, Southwest Coastal Lowland.
Kiana, Bering Strait.
King Cove, Aleutian.
Kipnuk, Southeast [sic] Coastal Lowland.
Kivalina, Bering Strait.
Kobuk, Bering Strait.
Kokhanok, Bristol Bay.
Koliganek, Bristol Bay.
Kongiganak, Southwest Coastal Lowland.

Kotlik, Southwest Coastal Lowland.
Kotzebue, Bering Strait.
Koyuk, Bering Strait.
Koyukuk, Koyukuk-Lower Yukon.
Pilot Point, Bristol Bay.
Pilot Station, Southwest Coastal Lowland.
Pitkas Point, Southwest Coastal Lowland.
Platinum, Southwest Coastal Lowland.
Point Hope, Arctic Slope.
Point Lay, Arctic Slope.
Portage Creek (Ohgsenakale), Bristol Bay.
Port Graham, Cook Inlet.
Port Heiden (Meshick), Aleutian.
Port Lions, Kodiak.
Quinhagak, Southwest Coastal Lowland.
Rampart, Upper Yukon-Porcupine.
Red Devil, Upper Kuskokwim.
Ruby, Koyukuk-Lower Yukon.
Russian Mission or Chauthalue (Kuskokwim), Upper Kuskokwim.
Russian Mission (Yukon), Southwest Coastal Lowland.
St. George, Aleutian.
St. Mary's, Southwest Coastal Lowland.
St. Michael, Bering Strait.
St. Paul, Aleutian.
Salamatof, Cook Inlet.
Sand Point, Aleutian.
Savonoski, Bristol Bay.
Savoonga, Bering Sea.
Scammon Bay, Southwest Coastal Lowland.
Selawik, Bering Strait.
Seldovia, Cook Inlet.
Shageluk, Koyukuk-Lower Yukon.
Shaktoolik, Bering Strait.
Sheldon's Point, Southwest Coastal Lowland.
Shishmaref, Bering Strait.
Shungnak, Bering Strait.
Slana, Copper River.

Sleetmute, Upper Kuskokwim.
South Naknek, Bristol Bay.
Squaw Harbor, Aleutian.
Stebbins, Bering Strait.
Stevens Village, Upper Yukon-Porcupine.
Stony River, Upper Kuskokwim.
Takotna, Upper Kuskokwim.
Tanacross, Tanana.
Tanana, Koyukuk-Lower Yukon.
Tatilek, Chugach.
Tazlina, Copper River.
Telida, Upper Kuskokwim.
Teller, Bering Strait.
Tetlin, Tanana.
Togiak, Bristol Bay.
Toksook Bay, Southwest Coastal Lowland.
Tulusak, Southwest Coastal Lowland.
Tuntutuliak, Southwest Coastal Lowland.
Tununak, Southwest Coastal Lowland.
Twin Hills, Bristol Bay.
Tyonek, Cook Inlet.
Ugashik, Bristol Bay.
Unalakleet, Bering Strait.
Unalaska, Aleutian.
Unga, Aleutian.
Uyak, Kodiak.
Venetie, Upper Yukon-Porcupine.
Wainwright, Arctic Slope.
Wales, Bering Strait.
White Mountain, Bering Strait.

(2) Within two and one-half years from the date of enactment of this Act, the Secretary shall review all of the villages listed in subsection (b) (1) hereof, and a village shall not be eligible for land benefits under subsections 14(a) and (b), and any withdrawal for such village shall expire, if the Secretary determines that—

(A) less than twenty-five Natives were residents of the village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; or,

(B) the village is of a modern and urban character, and the majority of the residents are non-Native.

Any Native group made ineligible by this subsection shall be considered under subsection 14(h).

(3) Native villages not listed in subsection (b) (1) hereof shall be eligible for land and benefits under this Act and lands shall be withdrawn pursuant to this section if the Secretary within two and one-half years from the date of enactment of this Act, determines that—

(A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and

(B) the village is not of a modern and urban character, and a majority of the residents are Natives.

NATIVE LAND SELECTIONS

43 U.S.C. § 1611

Sec. 12. (a) (1) During a period of three years from the date of enactment of this Act, the Village Corporation for each Native village identified pursuant to section 11 shall select, in accordance with rules established by the Secretary, all of the township or townships in which any part of the village is located, plus an area that will make the total selection equal to the acreage to which the village is entitled under section 14. The selection shall be made from lands withdrawn by subsection 11(a): *Provided,* That no Village Corporation may select more than 69,120 acres

from lands withdrawn by subsection 11(a) (2), and not more than 69,120 acres from the National Wildlife Refuge System, and not more than 69,120 acres in a National Forest: *Provided further,* That when a Village Corporation selects the surface estate to lands within the National Wildlife Refuge System or Naval Petroleum Reserve Numbered 4, the Regional Corporation for that region may select the subsurface estate in an equal acreage from other lands withdrawn by subsection 11(a) within the region, if possible.

(2) Selections made under this subsection (a) shall be contiguous and in reasonably compact tracts, except as separated by bodies of water or by lands which are unavailable for selection, and shall be in whole sections and, wherever feasible, in units of not less than 1,280 acres.

(b) The difference between twenty-two million acres and the total acreage selected by Village Corporations pursuant to subsection (a) shall be allocated by the Secretary among the eleven Regional Corporations (which excludes the Regional Corporation for southeastern Alaska) on the basis of the number of Natives enrolled in each region. Each Regional Corporation shall reallocate such acreage among the Native villages within the region on an equitable basis after considering historic use, subsistence needs, and population. The action of the Secretary or the Corporation shall not be subject to judicial review. Each Village Corporation shall select the acreage allocated to it from the lands withdrawn by subsection 11(a).

(c) The difference between thirty-eight million acres and the 22 million acres selected by Village Corporations pursuant to subsections (a) and (b) shall be allocated among the eleven Regional Corporations (which excludes the Regional Corporation for southeastern Alaska) as follows:

(1) The number of acres each Regional Corporation is entitled to receive shall be computed (A) by determining on the basis of available data the percentage of all land in

Alaska (excluding the southeastern region) that is within each of the eleven regions, (B) by applying that percentage to thirty-eight million acres reduced by the acreage in the southeastern region that is to be selected pursuant to section 16, and (C) by deducting from the figure so computed the number of acres within that region selected pursuant to subsections (a) and (b).

(2) In the event that the total number of acres selected within a region pursuant to subsections (a) and (b) exceeds the percentage of the reduced thirty-eight million acres allotted to that region pursuant to subsection (c) (1) (B), that region shall not be entitled to receive any lands under this subsection (c). For each region so affected the difference between the acreage calculated pursuant to subsection (c) (1) (B) and the acreage selected pursuant to subsections (a) and (b) shall be deducted from the acreage calculated under subsection (c) (1) (C) for the remaining regions which will select lands under this subsection (c). The reductions shall be apportioned among the remaining regions so that each region's share of the total reduction bears the same proportion to the total reduction as the total land area in that region (as calculated pursuant to subsection (c) (1) (A) bears to the total land area in all of the regions whose allotments are to be reduced pursuant to this paragraph.

(3) Before the end of the fourth year after the date of enactment of this Act, each Regional Corporation shall select the acreage allocated to it from the lands within the region withdrawn pursuant to subsection 11(a) (1), and from the lands within the region withdrawn pursuant to subsection 11(a) (3) to the extent lands withdrawn pursuant to subsection 11(a) (1) are not sufficient to satisfy its allocation: *Provided,* That within the lands withdrawn by subsection 11(a) (1) the Regional Corporation may select only even numbered townships in even numbered ranges, and only odd numbered townships in odd numbered ranges.

(d) To insure that the Village Corporation for the Native village at Dutch Harbor, if found eligible for land grants under this Act, has a full opportunity to select lands within and near the village, no federally owned lands, whether improved or not, shall be disposed of pursuant to the Federal surplus property disposal laws for a period of two years from the date of enactment of this Act. The Village Corporation may select such lands and improvements and receive patent to them pursuant to subsection 14(a) of this Act.

(e) Any dispute over the land selection rights and the boundaries of Village Corporations shall be resolved by a board of arbitrators consisting of one person selected by each of the Village Corporations involved, and an additional one or two persons, whichever is needed to make an odd number of arbitrators, such additional person or persons to be selected by the arbitrators selected by the Village Corporations.

• • • •

CONVEYANCE OF LANDS

43 U.S.C. § 1613

Sec. 14. (a) Immediately after selection by a Village Corporation for a Native village listed in section 11 which the Secretary finds is qualified for land benefits under this Act, the Secretary shall issue to the Village Corporation a patent to the surface estate in the number of acres shown in the following table:

If the village had on the 1970 census enumeration date a Native population between—	It shall be entitled to a patent to an area of public lands equal to—
25 and 99	69,120 acres.
100 and 199	92,160 acres.
200 and 399	115,200 acres.

400 and 599	138,240 acres.
600 or more	161,280 acres.

The lands patented shall be those selected by the Village Corporation pursuant to subsection 12(a). In addition, the Secretary shall issue to the Village Corporation a patent to the surface estate in the lands selected pursuant to subsection 12(b).

(b) Immediately after selection by any Village Corporation for a Native village listed in section 16 which the Secretary finds is qualified for land benefits under this Act, the Secretary shall issue to the Village Corporation a patent to the surface estate to 23,040 acres. The lands patented shall be the lands within the township or townships that enclose the Native village, and any additional lands selected by the Village Corporation from the surrounding townships withdrawn for the Native village by subsection 16(a).

• • • •

(e) Immediately after selection by a Regional Corporation, the Secretary shall convey to the Regional Corporation title to the surface and/or the subsurface estates, as is appropriate, in the lands selected.

(f) When the Secretary issues a patent to a Village Corporation for the surface estate in lands pursuant to subsections (a) and (b), he shall issue to the Regional Corporation for the region in which the lands are located a patent to the subsurface estate in such lands, except lands located in the National Wildlife Refuge System and lands withdrawn or reserved for national defense purposes, including Naval Petroleum Reserve Numbered 4, for which in lieu rights are provided for in subsection 12(a) (1): *Provided,* That the right to explore, develop, or remove minerals from the subsurface estate in the lands within the boundaries of any Native village shall be subject to the consent of the Village Corporation.

• • • •

MISCELLANEOUS

43 U.S.C. § 1621

* * * *

(e) If land within the National Wildlife Refuge System is selected by a Village Corporation pursuant to the provisions of this Act, the secretary shall add to the Refuge System other public lands in the State to replace the lands selected by the Village Corporation.

* * * *

(g) If a patent is issued to any Village Corporation for land in the National Wildlife Refuge System, the patent shall reserve to the United States the right of first refusal if the land is ever sold by the Village Corporation. Notwithstanding any other provision of this Act, every patent issued by the Secretary pursuant to this Act—which covers lands lying within the boundaries of a National Wildlife Refuge on the date of enactment of this Act shall contain a provision that such lands remain subject to the laws and regulations governing use and development of such Refuge.

(h) (1) All withdrawals made under this Act, except as otherwise provided in this subsection, shall terminate within four years of the date of enactment of this Act: *Provided*, That any lands selected by Village or Regional Corporations or by a Native group under section 12 shall remain withdrawn until conveyed pursuant to section 14.

(2) The withdrawal of lands made by subsection 11(a)(2) and section 16 shall terminate three years from the date of enactment of this Act.

* * * *

(4) The Secretary is authorized to terminate any withdrawal made by or pursuant to this Act whenever he determines that the withdrawal is no longer necessary to accomplish the purposes of this Act.

* * * *

PUBLICATIONS

43 U.S.C. § 1624

Sec. 25. The Secretary is authorized to issue and publish in the Federal Register, pursuant to the Administrative Procedure Act, such regulations as may be necessary to carry out the purposes of this Act.

SAVING CLAUSE

43 U.S.C. § 1625

Sec. 26. To the extent that there is a conflict between any provision of this Act and any other Federal laws applicable to Alaska, the provisions of this Act shall govern.

* * * *

Approved December 18, 1971.

APPENDIX B

FEDERAL REGISTER, VOL. 38, NO. 103
Wednesday, May 30, 1973

Title 43—Public Lands: Interior

CHAPTER II—BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR

Subchapter B—Land Resource Management (2000)

PART 2650—ALASKA NATIVE SELECTIONS

* * * *

Subpart 2651—Village Selections

§ 2651.0-3 Authority.

Sections 12 and 16(b) of the act provide for the selection of lands by eligible village corporations.

§ 2651.1 Entitlement.

(a) Village corporations eligible for land benefits under the act shall be entitled to a conveyance to the surface estate in accordance with sections 14(a) and 16(b) of the act.

(b) In addition to the land benefits in paragraph (a) of this section, each eligible village corporation shall be entitled to select and receive a conveyance to the surface estate for such acreage as is reallocated to the village corporation in accordance with section 12(b) of the act.

§ 2651.2 Eligibility requirements.

(a) Pursuant to sections 11(b) and 16(a) of the act, the Director, Juneau Area Office, Bureau of Indian Affairs, shall review and make a determination, not later than December 19, 1973, as to which villages are eligible for benefits under the act.

(1) *Review of listed native villages.* The Director, Juneau Area Office, Bureau of Indian Affairs, shall make a determination of the eligibility of villages listed in section 11(b)(1) and 16(a) of the act. He shall investigate and examine available records and evidence that may have a bearing on the character of the village and its eligibility pursuant to paragraph (b) of this section.

(2) *Findings of fact and notice of proposed decision.* After completion of the investigation and examination of records and evidence with respect to the eligibility of a village listed in sections 11(b)(1) and 16(a) of the act for land benefits, the Director, Juneau Area Office, Bureau of Indian Affairs, shall publish in the FEDERAL REGISTER and in one or more newspapers of general circulation in Alaska his proposed decision with respect to such eligibility and shall mail a copy of the proposed decision to the affected village, all villages located in the region in which the affected village is located, all regional corporations within the State of Alaska and the State of Alaska. His proposed decision is subject to protest by any interested party within 30 days of the publication of the proposed decision in the FEDERAL REGISTER. If no valid protest is received within the 30-day period, such proposed decision shall become final and shall be published in the FEDERAL REGISTER. If the final decision is in favor of a listed village, the Director, Juneau Area Office, Bureau of Indian Affairs, shall issue a certificate as to the eligibility of the village in question for land benefits under the act, and certify the record and the decision to the Secretary. Copies of the final decisions and certificates of village eligibility shall be mailed to the affected village, all villages located in the region in which the affected village is located, all regional corporations within the State of Alaska, and the state of Alaska.

(3) *Protest.* Within 30 days from the date of publication of the proposed decision in the FEDERAL REGISTER, any interested party may protest a proposed decision as to the

eligibility of a village. No protest shall be considered which is not accompanied by supporting evidence. The protest shall be mailed to the Director, Juneau Area Office, Bureau of Indian Affairs.

(4) *Action on protest.* Upon receipt of a protest, the Director, Juneau Area Office, Bureau of Indian Affairs, shall examine and evaluate the protest and supporting evidence required herein, together with his record of findings of fact and proposed decision, and shall render a decision on the eligibility of the Native village that is the subject of the protest. Such decision shall be rendered within 30 days from the receipt of the protest and supporting evidence by the Director, Juneau Area Office, Bureau of Indian Affairs. The decision of the Director, Juneau Area Office, Bureau of Indian Affairs, shall be published in the FEDERAL REGISTER and in one or more newspapers of general circulation in the State of Alaska and a copy of the decision and findings of fact upon which the decision is based shall be mailed to the affected village, all villages located in the region in which the affected village is located, all regional corporations within the State of Alaska, the State of Alaska, and any other party of record. Such decision shall become final unless appealed to the Secretary by a notice filed with the ad hoc board as established in paragraph (a)(5) of this section, within 30 days of its publication in the FEDERAL REGISTER.

(5) *Action on appeals.* Appeals to the Secretary shall be to the ad hoc Board which he has personally appointed. At least one member of the ad hoc Board shall be familiar with Native village life. Among those otherwise qualified to serve on the ad hoc Board, preference will be given to those familiar with Native village life. Appeals shall be filed and governed by the applicable regulations in part 4, subpart G, of this title, except that the appellant shall have not more than 15 days from the date of filing of his notice of appeal within which to file an appeal brief, and the

opposing parties shall have not more than 15 days from the date of receipt of the appellant's brief within which to file an answering brief. No more than 15 days shall be allowed for the filing of additional briefs in connection with such appeals. All hearings held in connection with such appeals shall be conducted in the State of Alaska. The decision of the ad hoc Board shall be submitted to the Secretary for his personal approval.

(6) *Applications by unlisted villages for determination of eligibility.* The head or any authorized subordinate officer of a Native village not listed in section 11(b) of the act may file on behalf of the unlisted village an application for a determination of its eligibility for land benefits under the act. Such application shall be filed in duplicate with the Director, Juneau Area Office, Bureau of Indian Affairs, prior to September 1, 1973. If the application does not constitute prima facie evidence of compliance with the requirements of paragraph (b) of this section, he shall return the application to the party filing the same with a statement of reasons for return of the application, but such filing, even if returned, shall constitute timely filing of the application. The Director, Juneau Area Office, Bureau of Indian Affairs, shall immediately forward an application which appears to meet the criteria for eligibility to the appropriate office of the Bureau of Land Management for filing. Each application must identify the township or townships in which the Native village is located.

(7) *Segregation of land.* The receipt of the selection application for filing by the Bureau of Land Management shall operate to segregate the lands in the vicinity of the village as provided in sections 11(a) (1) and (2) of the act.

(8) *Action on application for eligibility.* Upon receipt of an application which appears to meet the criteria for eligibility, the Director, Juneau Area Office, Bureau of Indian Affairs, shall have a notice of the filing of the

application published in the FEDERAL REGISTER and in one or more newspapers of general circulation in Alaska and shall promptly review the statements contained in the application. He shall investigate and examine available records and evidence that may have a bearing on the character of the village and its eligibility pursuant to this subpart 2651, and thereafter make findings of fact as to the character of the village. No later than December 19, 1973, the Director, Juneau Area Office, Bureau of Indian Affairs, shall make a determination as to the eligibility of the village as a Native village for land benefits under the act and shall issue a decision. He shall publish his decision in the FEDERAL REGISTER and in one or more newspapers of general circulation in Alaska and shall mail a copy of the decision to the representative or representatives of the village, all villages in the region in which the village is located, all regional corporations, and the State of Alaska.

(9) *Protest to eligibility determination.* Any interested party may protest a decision of the Director, Juneau Area Office, Bureau of Indian Affairs, regarding the eligibility of a Native village for land benefits under the provisions of sections 11(b)(3) (A) and (B) of the act by filing a notice of protest with the Director, Juneau Area Office, Bureau of Indian Affairs, within 30 days from the date of publication of the decision in the FEDERAL REGISTER. A copy of the protest must be mailed to the representative or representatives of the village, all villages in the region in which the village is located, all regional corporations within Alaska, the State of Alaska, and any other parties of record. If no protest is received within the 30-day period, the decision shall become final and the Director, Juneau Area Office, Bureau of Indian Affairs, shall certify the record and the decision to the Secretary. No protest shall be considered which is not accompanied by supporting evidence. Anyone protesting a decision concerning the eligibility or ineligibility of an unlisted Native village shall

have the burden of proof in establishing that the decision is incorrect. Anyone appealing a decision concerning the eligibility or ineligibility of an unlisted Native village shall have the burden of proof in establishing that the decision is incorrect.

(10) *Action on protest, appeal.* Upon receipt of a protest, the Director, Juneau Area Office, Bureau of Indian Affairs, shall follow the procedure outlined in paragraph (a)(4) of this section. If an appeal is taken from a decision on eligibility, the provisions of paragraph (a)(5) of this section shall apply.

(b) Except as provided in subparagraph (4) of this paragraph, villages must meet each of the following criteria to be eligible for benefits under sections 14 (a) and (b) of the act:

(1) There must be 25 or more Native residents of the village on April 1, 1970, as shown by the census or other evidence satisfactory to the Secretary. A Native properly enrolled to the village shall be deemed a resident of the village.

(2) The village shall have had on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style and at least 13 persons who enrolled thereto must have used the village during 1970 as a place where they actually lived for a period of time: *Provided,* That no village which is known as a traditional village shall be disqualified if it meets the other criteria specified in this subsection by reason of having been temporarily unoccupied in 1970 because of an act of God or government authority occurring within the preceding 10 years.

(3) The village must not be modern and urban in character. A village will be considered to be of modern and urban character if the Secretary determines that it possessed all of the following attributes as of April 1, 1970:

(i) Population over 600.

(ii) A centralized water system and sewage system that serves a majority of the residents.

(iii) Five or more business establishments which provide goods or services such as transient accommodations or eating establishments, specialty retail stores, plumbing and electrical services, etc.

(iv) Organized police and fire protection.

(v) Resident medical and dental services, other than those provided by Indian Health Service.

(vi) Improved streets and sidewalks maintained on a year-round basis.

(4) In the case of unlisted villages, a majority of the residents must be Native, but in the case of villages listed in sections 11 and 16 of the act, a majority of the residents must be Native only if the determination is made that the village is modern and urban pursuant to subparagraph (3) of this paragraph.

* * * * *

ROGERS C. B. MORTON,
Secretary of the Interior.

May 23, 1973.

[FR Doc. 73-10598 Filed 5-29-73; 8:45 am]

APPENDIX C

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1325

KONIAG, INC.
THE VILLAGE OF UYAK

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT

(Civil 74-1061)

No. 76-1326

THE VILLAGE OF LITNIK KONIAG, INC.

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT

(Civil 74-1791)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

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No. 76-1327

SALAMATOF VILLAGE ASSOCIATION and
COOK INLET REGION, INC.

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT

(Civil 74-1134)

No. 76-1328

THE VILLAGE OF ANTON LARSEN BAY KONIAG, INC.

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT

(Civil 74-1792)

No. 76-1329

THE VILLAGE OF UGANIK KONIAG, INC.

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT

(Civil 74-1790)

No. 76-1330

THE VILLAGE OF BELLS FLATS KONIAG, INC.

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT

(Civil 74-1793)

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No. 76-1331

THE VILLAGE OF AYAKULIK KONIAG, INC.

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT

(Civil 74-1794)

No. 76-1332

THE VILLAGE OF PORT WILLIAM KONIAG, INC.

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT

(Civil 74-1795)

No. 76-1333

THE VILLAGE OF SOLOMON BERING SRAITS
NATIVE CORPORATION

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT

(Civil 75-0452)

No. 76-1334

VILLAGE OF ALEXANDER CREEK COOK INLET REGION, INC.

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT

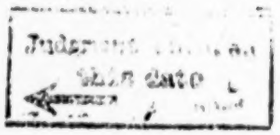
(Civil 75-1097)

4

Appeals from the United States District Court
for the District of Columbia

Argued March 24, 1977

Decided April 28, 1978



Jacques B. Gelin, Attorney, Department of Justice, with whom *Peter R. Taft, Assistant Attorney General, Edmund B. Clark, Raymond N. Zagone* and *Herbert Pittle*, Attorneys, Department of Justice, were on the brief for appellant.

Edward Weinberg and *F. Conger Fawcett* with whom *Frederick L. Miller, Jr.* and *John P. Meade* were on the brief for appellees.

Avrum M. Gross, Attorney General, State of Alaska filed a brief on behalf of the State of Alaska as amicus curiae urging reversal.

Before: WRIGHT, *Chief Judge*, BAZELON and ROBB, *Circuit Judges.*

Opinion for the Court filed by Circuit Judge Robb.

Concurring Opinion filed by *Circuit Judge* BAZELON.

ROBB, *Circuit Judge*: The plaintiffs, eleven Native Alaskan villages, filed this action to challenge decisions of the Secretary of Interior which found each of them ineligible to take land and revenues under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601 *et seq.*

The Alaska area director of the Bureau of Indian Affairs (BIA) had determined initially that all eleven villages were eligible under ANCSA but on administrative appeal the Secretary of the Interior ruled to the

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contrary. Granting summary judgment to the villages[1] the District Court vacated the Secretary's determinations and ordered the BIA decisions reinstated. *Koniag, Inc. v. Kleppe*, 405 F. Supp. 1360 (D.D.C. 1975). The District Court did so in four of the cases on the ground that the BIA decisions had been appealed to the Secretary by a party without standing to do so; the appeals were therefore unauthorized and invalid, and under Department of the Interior regulations, the BIA decision, if unappealed, constituted the final decision of the Secretary. In the other seven cases, the court held the procedure followed to determine the appeals failed to comply with due process and further, that congressional interference had infected the determinations. The court ordered the BIA decisions reinstated in these seven cases because the effects of the congressional interference lingered and the BIA decisions were the last untainted decisions of the Secretary's delegate.

On appeal the Secretary attacks each of the District Court's rulings on the merits and argues that the proper remedy under any circumstance is a remand to him rather than reinstatement of the BIA decisions. We conclude that the District Court erred on the standing and congressional interference issues. We agree with the District Court, however, that the appeal procedure used here does not meet the requirements of due process. Accordingly, we hold that the proper remedy is a remand to the Secretary to redetermine these cases.

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[1] The villages are Alexander Creek, Anton Larsen Bay, Ayakulik, Bells Flats, Litnik, Port William, Salamatof, Solomon, Uganik, and Uyak. The Secretary has dismissed his appeal from the judgment as it applies to the eleventh village, Pauloff Harbor.

THE ACT AND THE REGULATIONS

Claims of Native Alaskans have long created obstacles to development of Alaska's oil and other natural resources and have raised questions of the state's ability to take dominion over public lands that it might otherwise select under provisions of the Alaska Statehood Act. To deal with this problem Congress intended ANCSA to accomplish a fair, rapid settlement of all aboriginal land claims by Natives and Native groups without litigation. The District Court's opinion contains an excellent summary of ANCSA, 405 F. Supp. 1364-67; for our purposes here, however, the complexities of the Act can be simplified. Under ANCSA, 40 million acres of land and $962,000,000 are to be distributed to Native villages and regional corporations; in exchange, all aboriginal titles and claims are to be extinguished. The funds and lands made available through the Act are to be divided among 13 regional corporations, in which the Natives hold stock, and whatever villages are found to be eligible. Depending upon their population, eligible villages may select between 69,120 and 161,280 acres from the public lands in their vicinity. The village will receive a patent to the surface estate and the regional corporation will receive a patent to the subsurface estate. Village eligibility requirements are set forth in the Act. 43 U.S.C. § 1610(b)(2), (3). The Secretary of the Interior is charged with making village eligibility determinations and with implementing the Act.

The Secretary adopted regulations to govern the decision-making process. 43 C.F.R. Part 2650 (1973). These regulations were applied in deciding the cases of the eleven villages. The Alaska area director of the BIA made initial eligibility determinations on all applicant Native villages. He published his proposed decision in the Federal Register and it became the final decision of the Secretary unless protested by "any interested party"

within thirty days. Upon receipt of a protest, the area director evaluated it and rendered his final decision within thirty days. This decision, in turn was appealed to the Secretary by an "aggrieved party" filing notice with the Alaska Native Claims Appeal Board.[2] 43 C.F.R. § 2651.2 (1973); *id.* § 4.700 (1973). Although the regulations did not require a particular type of hearing on appeals, the Board referred all appeals to a Department of the Interior Administrative Law Judge (ALJ) who conducted a full *de novo* hearing on the record. The parties were permitted to submit proposed findings and conclusions to the ALJ.

At this point the procedure veered from the usual course of administrative law. The recommended decision of the ALJ was forwarded to the Board without being served on the villages concerned. The Board made formal decisions based on the hearing record in each case and forwarded its recommended decisions to the Secretary, also without service on the villages. Only after the Secretary personally decided to accept the Board's decisions were the recommended decisions of the ALJ and the Board revealed to the parties.

STANDING

The first issue we must resolve is whether appeals from the BIA decisions were properly taken. The BIA area director determined that all ten of the villages before us here, *see* note 1 *supra*, were eligible under ANCSA. The U.S. Fish and Wildlife Service, the Forest Service, and the State of Alaska appealed one or another of the decisions, arguing that the villages did not meet the requirements of the Act. After separate *de novo* proceedings before an ALJ and review as described above, the

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[2] Initially the Board was merely an ad hoc Board. Later the present title was created.

Secretary ruled that the villages were not eligible under the Act.

In the District Court the villages renewed the argument which they had pressed before the ALJ that neither the federal agencies nor the State had standing to appeal from the BIA decisions. The District Court rejected the argument with respect to six of the villages because of the possibility that they might select land from a Wildlife Refuge or National Forest. The court noted:

> some presently immeasurable degree of disadvantage may result if an unqualified village obtains authority over a portion of the lands now in the exclusive care of the United States and that this is sufficient to provide standing. . . . Moreover, the Forest Service and the Fish and Wildlife Service have broad mandates to protect our forests and wildlife, *e. g.*, 16 U.S.C. §§ 551, 553; 16 U.S.C. § 742a *et seq.* The Court is particularly reluctant to deny standing to those most likely in fact to have a legitimate concern about these lands and to come forward to protect the public interest, especially where the effect of finding standing is simply to allow adversary proceedings to be held which, if properly conducted, could contribute to fair and informed decision making.

495 F. Supp. at 1368-69.

We agree with the District Court's reasoning here and adopt it.[3] However the District Court went on to hold

[3] The appellee villages have challenged the District Court's decision that the Forest Service and the Fish and Wildlife Service have standing with respect to the six villages. The Secretary argues that the challenge is barred because the villages have not cross-appealed. Having prevailed below, however, the villages obviously could not have cross-appealed on this issue. Insofar as this attack on the ruling supports their judgment below, however, they may urge the argument here. United States v. American Ry. Express Co., 265 U.S. 425, 435 (1924); *see* Dandridge v. Williams, 397 U.S. 471, 475-76 n.6 (1970).

that the appeals from the BIA decisions in four other cases were invalid because as to two, Anton Larsen Bay and Bells Flats, the federal agencies had no standing to take the appeals, and as to two others, Alexander Creek and Solomon, the State of Alaska had no standing.

The Federal Agencies

The District Court ruled against the standing of the agencies to appeal the cases of Anton Larsen Bay and Bells Flats because

> [e]ach of these two villages had made extensive good-faith commitments not to take land from a wildlife refuge or national forest. Even the most theoretical harm was removed by these commitments . . .

405 F. Supp. at 1369.

The issue is whether the Secretary has violated his regulations in permitting the Fish and Wildlife Service and the Forest Service to appeal administratively the decision on the eligibility of the two villages. Under the regulations, "any interested party" may protest the BIA initial decision, 43 C.F.R. § 2651.2(a)(3) (1973), and "any party aggrieved" by the BIA final decision may appeal to the Board. 43 C.F.R. § 4.700 (1973). The villages concede that these agencies were "interested parties" for purposes of protest but argue that they were not "parties aggrieved" to appeal. Citing *Office of Communication of the United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 334, 359 F.2d 994, 1000 (1966) and *National Welfare Rights Organization v. Finch*, 139 U.S. App. D.C. 46, 53 n.27, 429 F.2d 725, 732 n.27 (1970) for the proposition that "the concept of standing at the administrative level and in the courts is essentially interchangeable," brief at 15, the villages argue that the agencies are not "parties aggrieved" because they have not demonstrated the kind of concrete injury necessary

for standing to obtain judicial review. Neither case stands for so broad a proposition.

In the *Church of Christ* case the court assumed that the same standards apply to determining standing before an agency and standing to obtain judicial review and went on to hold that the FCC must permit listeners to participate in broadcast relicensing proceedings. In the *National Welfare Rights Organization* case the court reasoned that a party with an interest sufficient to obtain judicial review of agency action should be permitted to participate before the agency to ensure it meaningful judicial review on all the issues. But it does not follow from either case that a party must be *excluded* from participation before the agency if it does not have a sufficient interest to meet Article III requirements for judicial review. Indeed, as we pointed out in the *National Welfare Rights Organization* case, "standing to sue depend[s] on more restrictive criteria than standing to appear before administrative agencies. . ." 139 U.S. App. D.C. at 53 n.27, 429 F.2d at 732 n.27; *see Gardner v. FCC*, 174 U.S. App. D.C. 234, 238, 530 F.2d 1086, 1090 (1976). *See also* 3 *K. Davis, Administrative Law Treatise* § 22.08, at 240 (1958). To determine what a party must show to qualify as aggrieved under the regulations, we look to the scheme intended and devised by the Congress and the Secretary. *See Office of Communication of the United Church of Christ v. FCC, supra* at 334-36, 359 F.2d at 1000-02.

Congress sought to quiet the Native land claims in Alaska justly and expeditiously, so that the State's development could proceed. At the same time Congress took care to assure that grants of public lands would be made only to eligible Native groups by requiring the Secretary to review the eligibility of each village. Over two hundred villages were involved. Although many findings could be perfunctory because eligibility was clear, the

eligibility of some villages was in dispute. It is apparent that the Secretary intended the area director of the BIA to settle the easy, undisputed cases, but when a party was adversely affected by the area director's determination, the Secretary would make his own eligibility determination after more elaborate factfinding in the three-tiered appeal process. A necessary corollary to this scheme is that the term "party aggrieved" must be construed generously to achieve the congressional objective that determinations be careful as well as quick. We conclude, therefore, that grafting strict judicial standing requirements onto these regulations would be inconsistent with the Act and the Secretary's plan to implement it.

Both the ALJ and the Board determined that the Forest Service and the Fish and Wildlife Service were parties aggrieved within the meaning of 43 C.F.R. § 4.700 (1973). Because he approved the Board's decisions the Secretary is presumed to have concurred. This interpretation of the regulation is entitled to great deference. *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

The District Court found it determinative that the two villages "had made extensive good-faith commitments not to take land from a wildlife refuge or a national forest". 405 F. Supp. at 1369. However, the ALJ and the Board had held that this did not vitiate the standing of the agencies to appeal. We agree. These villages are located on Kodiak and Afognak Islands, large parts of which are included in Chugach National Forest and Kodiak National Wildlife Refuge. Available public land is thus limited and numerous villages appear to be eligible to select from it. If the two villages make all their selections from the limited unrestricted acreage, other villages may be compelled to choose land within the refuge or forest. The adverse effect on the Forest Service or the Fish and Wildlife Service would be plain. Ample testimony in the records of these two cases, credited by the ALJ, supports

the likelihood of this occurring. Bells Flats ALJ Recommended Decision at 9-10; Anton Larsen Bay ALJ Recommended Decision at 9-10. At best, therefore, the commitments of the two villages not to select forest or refuge land attenuate the likelihood of harm to these agencies, but they do not negate it. We cannot say that the rationale of the ALJ, or of the Board in adopting it, amounts to a "plainly erroneous" interpretation of the term "party aggrieved" as it is used in the regulations. *Udall v. Tallman, supra* at 17. Thus we must sustain that interpretation and reverse the District Court's holding that the appeals from the BIA decision on Anton Larsen Bay and Bells Flats were invalid.

The State of Alaska

Alaska was the only party to appeal the decision on the eligibility of Solomon and Alexander Creek.[4] The District Court held that Alaska had no standing to do so because "[t]he State's only interest was the speculative possibility that at some later time for some undisclosed reason it might, under the Alaska Statehood Act, seek to have land patented to it that would be claimed by these villages." 405 F. Supp. at 1369. We think this possibility is enough to confer standing upon Alaska under the regulations.

The Alaska Statehood Act, 72 Stat. 339 (1958), gives Alaska until 1984 to select more than 103 million acres from federal lands in the state not already reserved for another purpose. *Id.* § 6(a), (b), 72 Stat. 340. Putting aside minor exceptions not relevant here, ANCSA reserves 25 townships immediately surrounding a Native

[4] A political subdivision, the Borough of Matanuska-Susitna also challenged the eligibility of Alexander Creek. Because it appears that the interests of the State and its subdivision are substantially identical, we will deal only with the State's positions here.

village from which the village must select its lands. The regional corporations may fill their land entitlements only with land surrounding a village, and the land patented to the villages and regional corporations cannot be selected by the State. Thus it is in the interest of the regional corporations to establish the existence of eligible villages on valuable mineral-bearing lands, and it is in the interest of the State to prove that such villages are ineligible.

The District Court was persuaded that Congress already accounted for the State's interests in the Act when it

> excluded from the definition of "public lands" that could be taken by the villages any "land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969," 43 U.S.C. § 1602(e) (Supp. III, 1973). The failure of the State to bring itself within this statutory provision underscores the conjectural and attenuated nature of its interest here. Alaska had ample opportunity to select land but did not do so, and one does not have standing merely by appearing in a case for the purpose of keeping one's options open an indefinite period in the future.

405 F. Supp. at 1369.

The provision cited by the District Court protects lands in which Alaska already had expressed interest; but we do not infer from it a congressional intention to negate any interest Alaska might have elsewhere. At the time of statehood, and even now, the value of much of the land was not and has not been established. We think Alaska has been reasonable in exercising its right under the Statehood Act to wait until 1984 to complete its land

selections.[5] As in the case of the federal agencies, our inquiry is limited to determining whether the Secretary has violated his regulations in permitting Alaska to take these apeals as a party aggrieved.

The regulations provide that the BIA decisions are to be served on the village affected, all villages within the region, all regional corporations and the State of Alaska. 43 C.F.R. § 2651.2(a)(2), (4), (8). We interpret this requirement as evidence that the Secretary regarded these parties as potentially aggrieved if a village were wrongfully determined to be eligible or ineligible. We agree with the District Court that the interest of Alaska in these two cases is conjectural at best but we emphasize we are not dealing with Article III considerations here; rather, the inquiry is whether the Secretary has violated his own regulations. In light of the broad reading which the Secretary has given the term "party aggrieved" we cannot say that permitting Alaska to appeal in the cases of Solomon and Alexander Creek was a plainly erroneous interpretation of the regulations.

We hold therefore that all ten of the administrative appeals taken in these cases were valid and we turn to the question whether the procedure followed comported with principles of due process.

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[5] In the Statehood Act, Alaska disclaimed all rights to lands held by Natives or by the United States in trust for Natives. 72 Stat. 339 (1958). Through ANCSA Congress has elected to extinguish all aboriginal titles and, in exchange therefor, to patent lands to regional corporations in which all Natives participate and to certain villages in which some Natives live. The disclaimer in the Statehood Act clearly bars Alaska from challenging ANCSA itself. But we think it does not bar Alaska from attempting to show that a given village does not meet the threshold requirements of ANCSA any more than it bars Alaska from challenging the title of an Englishman who merely alleges that he is a Native Alaskan.

THE ADMINISTRATIVE APPEAL PROCEDURE

The District Court held that the administrative process used here was improper because the

> Secretary, who reserved final decision to himself, was prevented from making a rational decision on the records developed because the decisions of both the administrative law judges and the Ad Hoc Board were kept *in camera* and remained undisclosed to the parties until the Secretary had already reached his final decision. This process denied the villages the opportunity to bring to the Secretary's attention any exceptions or objections they might have had to the determinations below.[5]

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[5] Indeed, it appears that the Secretary did not even see the proposed findings of fact submitted by the villages to the administrative law judges.

405 F. Supp. at 1370 [footnote omitted].

The Secretary argues that the administrative decision-making was institutional. Relying upon the *Morgan* cases[6] the Secretary asserts that he was not required to circulate to the parties "recommended decisions prepared by subordinates for approval by the Secretary." Under this analysis the ALJ and the Board are mere assistants who aided the Secretary in making his decision by tendering recommendations in the nature of draft decisions. The institutional process used here, in the Secretary's view, met whatever due process requirements there were by affording all parties an opportunity to present their cases and confront their opponents before the ALJ.[7] We do not agree.

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[6] Morgan v. United States, 298 U.S. 468 (1936); Morgan v. United States, 304 U.S. 1 (1938); United States v. Morgan, 307 U.S. 183 (1939); United States v. Morgan, 313 U.S. 409 (1941).

[7] Evidently the submissions of the villages which were received were not even forwarded to the Secretary with the record. *See* 405 F. Supp. at 1370 n.5.

At the outset we affirm the District Court's holdings that the villages have a sufficient property interest to come within the due process clause. 405 F. Supp. at 1370. Indeed the Secretary concedes as much. The issue is what process is due under the circumstances. The Secretary argues that the opportunity to present a case and to confront opponents before the ALJ was enough. The difficulty with this position is that it overlooks the mandate of Congress in ANCSA which declares that "the settlement should be accomplished . . . with maximum participation by Natives in decisions affecting their rights and property." 43 U.S.C. § 1601(b). We are unable to reconcile the Secretary's "institutional" approach with so clear an expression of Congress' will.

The only conceivable purpose of the secret review procedure was to expedite the resolution of the claims. This is a valid purpose, responsive to Congress' instruction that the settlement be accomplished rapidly; nevertheless, affording the villages an opportunity to see the recommended decisions and to brief exceptions to them would cause only a slight delay in the proceedings. At the same time that opportunity would greatly enhance the participation of the Natives as well as the appearance of fairness so critical to the administrative process.

Determinations of village eligibility need not comply with the Administrative Procedure Act (APA) requirements for adjudications because ANCSA does not require that they be made "on the record after an opportunity for an agency hearing." 5 U.S.C. § 554(a); *see* 43 U.S.C. § 1610(b)(2), (3). Nonetheless, we are guided by its requirements in a case such as this which entails due process rights but has no controlling statutory procedures. *See Wong Yang Sung v. McGrath*, 339 U.S. 33, 50-51 (1950); *Riss & Co. v. United States*, 341 U.S. 907 (1951), *rev'g per curiam*, 96 F. Supp. 452 (W.D. Mo. 1950) (3 judge court). Section 557(c) of the APA provides that

parties be given an opportunity to submit proposed findings and conclusions, or exceptions to decisions before a recommended, initial, or tentative decision of an agency is reviewed within the agency. In these cases there were two intermediate decisions in the administrative review process, the ALJ's initial decisions and the Board's recommended decisions. The villages had an opportunity to submit, and did submit, proposed findings and conclusions to the ALJs before the initial decisions were made. The villages were not, however, permitted to see the ALJs' decisions nor were they permitted to submit exceptions before the Board made its recommended decisions. We believe that ANCSA's requirement of maximum participation by the Natives required the Secretary to extend the full measure of procedural rights suggested by section 557(c). Considering the great importance to the Natives of these potential property rights (the *quid pro quo* for the extinguishment of their aboriginal titles), the congressional requirement of maximum participation by the Natives, and the minimal cost to administrative expediency, *see Mathews v. Eldredge*, 424 U.S. 319, 335 (1976), we hold that on remand the Secretary must permit the parties to take exceptions to the ALJs' decisions[8] and to submit briefs thereon to the Board.

The Supreme Court's recent decision in *Vermont Yankee Nuclear Power Corp. v. NRDC*, —— U.S. ——, 46 U.S.L.W. 4301 (Apr. 3, 1978) does not require a different result. In that case, the Court held that a reviewing court may not dictate to an agency the methods and procedures to be followed to develop an adequate record for judicial review.

> Absent constitutional constraints or extremely compelling circumstances "the administrative agencies

[8] The ALJ recommended decisions themselves are not attacked here and are accordingly not disturbed.

'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" *Federal Communications Comm'n v. Schreiber*, 381 U.S. 279, 290 (1965), quoting from *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940).

46 U.S.L.W. at 4307. Our holding today does not trench upon this principle. We hold only that the Secretary's secret review process is inconsistent with both constitutional constraints and the mandate of ANCSA that Natives participate as fully as possible in the decisionmaking.

THE REMEDY

The District Court ordered the decisions of the BIA area director reinstated because hearings conducted by Congressman Dingell "constituted an impermissible congressional interference with the administrative process", 405 F. Supp. at 1372, which destroyed the appearance of administrative impartiality and caused actual prejudice to the villages, denying them fundamental fairness required by the Fifth Amendment. *See Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966). The court believed that the effects of the interference lingered making the usual remedy, remand to the Secretary for a redetermination, impossible. We disagree.

The hearings in question were called by Congressman Dingell in June of 1974 at the time the Board and the Secretary were considering most of these cases. *Alaska Native Claims, Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries*, 93d Cong., 2d Sess. (1975). During the hearings Congressman Dingell made no secret of his displeasure with some of the initial BIA eligibility determinations. Nevertheless, we think the *Pillsbury* decision is not controlling here because none of the persons called before the subcommittee was a decisionmaker in these cases. One possible exception was Mr. Ken Brown, a close advisor to the Secretary who briefed him on the cases at the time he decided to approve the Board's recommended decisions. However, even if we assume that the *Pillsbury* doctrine would reach advisors to the decisionmaker, Mr. Brown was not asked to prejudge any of the claims by characterizing their validity. *See Pillsbury Co. v. FTC*, *supra* at 964. The worst cast that can be put upon the hearings is that Brown was present when the subcommittee expressed its belief that certain villages had made fraudulent claims and that the BIA decisions were in error. This is not enough.

A more serious matter is a letter that Congressman Dingell sent to the Secretary two days before he determined that eight of these villages were ineligible. The letter requested the Secretary to postpone his decisions on the cases pending a review and opinion by the Comptroller General, because it "appears from the testimony [at the hearings] that village eligibility and Native enrollment requirements of ANCSA have been misinterpreted in the regulations and that certain villages should not have been certified as eligible for land selections under ANCSA." The letter did not specify any particular villages, but we think it compromised the appearance of the Secretary's impartiality.[9] *D.C. Federation of Civic Ass'ns v. Volpe*, 148 U.S. App. D.C. 207, 222, 459 F.2d 1231, 1246, *cert. denied*, 405 U.S. 1030 (1972); *see Pillsbury Co. v. FTC*, *supra* at 964. Nevertheless, a remand to the Secretary, rather than a reinstatement of the BIA decisions, is the proper remedy in this case. Assuming the worst—that the letter contributed to the Secretary's decision in these cases—we cannot say that 3½ years

[9] We of course intimate no view as to the validity of the Congressman's criticism.

later, a new Secretary in a new administration is thereby rendered incapable of giving these cases a fair and dispassionate treatment.

RESIDENCE DETERMINATION

One final matter remains to be considered. The villages challenge the District Court's conclusion that because the residence of Natives is not established conclusively by the roll prepared by the Secretary pursuant to 43 U.S.C. § 1604 residence was open to redetermination in the village eligibility proceedings. The Secretary argues that this challenge is barred because no cross-appeal was filed. We reject this argument, *see* note 3 *supra*, but affirm the District Court's interpretation of the statute for the reasons stated in its opinion.[10] 405 F. Supp. 1373-74.

CONCLUSION

We hold the administrative appeals by the Fish and Wildlife Service, the Forest Service, and the State of Alaska were valid. The appeal process itself, however, should have permitted the parties to take exceptions to the ALJs' recommended decisions and to submit briefs to the Board for its consideration. Therefore, these cases must be remanded to the District Court for remand to the Secretary for redetermination of the appeals. The judgment of the District Court is

Affirmed in part, reversed in part.

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[10] The District Court also ruled that the Secretary had not violated his trust responsibilities to the Alaska Natives and that th. statutory criteria in the Act for "listed" villages are exclusive. 405 F. Supp. at 1373-74. No appeal has been taken on either issue and we leave the District Court ruling undisturbed.

BAZELON, *Circuit Judge, concurring:* I join Judge Robb's fine opinion for the court, but wish to highlight my reasons for concluding that appellants had standing to seek administrative review of the village eligibility decisions.

The decisions of this court and others on administrative standing have created not a little uncertainty.[1] It is unclear whether the limitations appertinent to judicial standing apply in the administrative context. And if such limitations do not apply, it is unclear what standards should govern. For the reasons set forth below, I find no basis for importing judicial standing doctrines into the administrative area. In my view, administrative standing should be determined in light of the functions of an administrative agency, and whether a would-be participant would contribute to fulfilling those functions.

I.

An examination of the theoretical foundations of judicial standing reveals no reason to equate judicial and administrative standing. The Supreme Court has identified two general types of judicial standing limitations—constitutional limitations derived from the "case or controversy" requirement of Article III, and prudential limitations formulated by the Court in its supervisory capacity over the federal judiciary. *See generally, Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 37-46 (1976); *Warth v. Seldin*, 422 U.S. 490, 498-502 (1975). Neither type of limitation is applicable in the administrative context.

The "case or controversy" requirement of Article III restricts federal courts to adjudication of disputes in which a plaintiff has a "personal stake" in the outcome.

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[1] *See* text and notes at nn.5-7 *infra*.

Baker v. Carr, 369 U.S. 186, 204 (1962). This means, first and most fundamentally, that a plaintiff must allege "some threatened or actual injury resulting from the putatively illegal action. . . ." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). In addition, the Supreme Court has ruled that a plaintiff must assert an injury that is likely to be "redressed by a favorable decision," *Eastern Kentucky, supra* at 38, and an injury that can fairly "be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Id.*

Administrative agencies, like federal courts, frequently exercise adjudicatory or "quasi-judicial" functions. But administrative tribunals have few if any of the indicia of the "inferior courts" Congress is authorized to establish pursuant to Article III.[2] Even independent regulatory agencies do not share the two attributes of federal courts explicitly mentioned by the Constitution—secure compensation and life tenure. Hence, administrative agencies are not bound by the "case or controversy" limitation of Article III.[3] Congress, in its discretion, can require that any person be admitted to administrative

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[2] *See* Glidden Co. v. Zdanok, 370 U.S. 530, 552 (1962) (opinion of Harlan, J., joined by Brennan and Stewart, JJ.) ("[W]hether a tribunal is to be recognized as one created under Article III depends basically upon whether its establishing legislation complies with the limitations of that article; whether, in other words, its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite."); Gardner v. FCC, 530 F.2d 1086, 1090 n.18 (D.C. Cir. 1976) ("[A]djudicative agencies are really a type of 'legislative court, which operates free from the restrictions of Article III.").

[3] *Cf.* Palmore v. United States, 411 U.S. 389 (1973) (Article I tribunal need not comply with the tenure and salary provisions of Article III.)

proceedings, whether or not that person has alleged "injury in fact" or has satisfied the other constitutional standing requirements recognized by the Supreme Court.

Prudential rules of judicial standing, like Article III limitations, are "founded in concern about the proper—and properly limited—role of courts in a democratic society." *Warth, supra* at 498. The major prudential limitations recognized by the Supreme Court are the requirement that the plaintiff assert an interest " 'arguably within the zone of interests to be protected or regulated' by the statutory framework within which his claim arises," *Eastern Kentucky, supra* at 39 n.19; that the plaintiff assert more than "a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens," *Warth, supra* at 499; and that the plaintiff assert his own rights and interests, rather than those of third parties. *Id.*

The function of prudential standing rules, the Court has stressed, is to "limit the role of courts in resolving public disputes." *Warth, supra* at 498; *id.* at 500. Prudential limitations serve to define "the proper judicial role relative to the other major governmental institutions in the society." *Tax Analysts and Advocates v. Blumenthal*, 566 F.2d 130, 139 (D.C.Cir 1977). In short, prudential limitations reflect a concern about the limited authority and competence of the judiciary in setting general policy.

As such, prudential limitations are no more applicable to administrative agencies than Article III limitations. The authority of federal courts to set general policy is restricted by Article III, which empowers courts to hear only "cases" and "controversies." Administrative agencies, on the other hand, derive their powers from Congress, and thus indirectly from Article I. Although this

delegation of power is subject to limitations,[4] an agency has unquestioned authority to set general policies affecting large numbers of people when it acts within the scope of its statutory mandate.

The competence of federal courts to formulate general policy is also severely limited by the method in which they reach decisions. Courts are confined to the resolution of particular disputes in an adversary setting. Administrative agencies, however, have unique resources for establishing broad, prospective policies. Unlike courts, administrative agencies can devote uninterrupted attention to relatively narrow problem areas, and can call upon technical staff assistance in formulating solutions. Unlike courts, they are not limited to the adjudicatory format, but have the flexibility to proceed by adjudication, legislative hearings, rulemaking, investigation or in other ways. And unlike courts, agencies do not have to wait for a plaintiff to file suit; they have the power to institute an investigation or an action on their own initiative.

The decisions of this circuit, as appellants acknowledge, are "not uniform" on the subject of whether judicial standing principles should be applied in administrative proceedings. App. Br. at 14 n.4. Admittedly, a number of decisions, including one by the author of this opinion, have applied judicial standing concepts in determining whether a party should have standing before an agency.[5]

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[4] National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974).

[5] Martin-Trigona v. Federal Reserve Bd., 509 F.2d 363, 366 (D.C. Cir. 1975) (Bazelon, C.J.); *see also* American Civil Liberties Union v. FCC, 523 F.2d 1344, 1347 (9th Cir. 1975); National Welfare Rights Org. v. Finch, 429 F.2d 725, 732-33 (D.C.Cir. 1970); Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1000 n.8 (D.C.Cir. 1966) and cases cited. For cases recognizing a distinction between judicial and administrative standing *see, e.g.*, Pittsburgh & W.Vir. Ry. Co. v. United States, 281 U.S. 378 (1930); Alexander Sprunt & Son, Inc. v. United States, 281 U.S. 249 (1930); Gardner v. FCC, 530 F.2d 1086, 1090 (D.C.Cir. 1976); Chemehuevi Tribe of Indians v. FPC, 489 F.2d 1207, 1212 n.12 (D.C. Cir. 1973); United States v. Board of Sch. Com'rs. of Indianapolis, Ind., 466 F.2d 573, 577 (7th Cir. 1972); National Motor Freight Traffic Ass'n v. United States, 205 F.Supp. 529, 593-94 (D.D.C.), *aff'd*, 371 U.S. 223 (1962), *reh. denied and opinion clarified*, 372 U.S. 246 (1963). Commentators have generally recognized that there are practical and theoretical differences between administrative and judicial standing. *See* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 239-43 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 524 (1965); Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV. 721, 726, 767 (1968).

At the same time, however, nearly all courts that have considered the question have recognized at least a theoretical distinction between judicial and administrative standing.[6] Moreover, most decisions that apply judicial standing concepts stand only for the proposition that if a party would have standing to seek judicial review of administrative action, he should be allowed to appear before the agency, if only to assure the proper development of the record. *See, e.g., National Welfare Rights Organization v. Finch*, 429 F.2d 725, 736-37 (D.C.Cir.

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[6] As we stated in Gardner v. FCC, 530 F.2d 1086, 1090 (D.C. Cir. 1976):

> Within their legislative mandates, agencies are free to hear actions brought by parties who might be without party standing if the same issues happened to be before a federal court. The agencies' responsibility for implementation of statutory purposes justifies a wider discretion, in determining what actions to entertain, than is allowed to the courts by either the constitution of the common law.

See also Martin-Trigona v. Federal Reserve Bd., 509 F.2d 363, 366 n. 10 (D.C. Cir. 1975); National Welfare Rights Org. v. Finch, 429 F.2d 725, 732 (D.C. Cir. 1970).

1970).[7] As such, these cases do not establish that administrative standing would necessarily be improper if a party would *not* have standing to obtain judicial review.

The fact that judicial and administrative standing are conceptually distinct does not, of course, mean that Congress could not require an administrative agency to apply judicial standing concepts in determining administrative standing. Nor does it mean that courts and agencies should never refer to judicial standing decisions, where helpful, by way of analogy. But absent a specific justification for invoking judicial standing decisions, I see no basis for interjecting the complex and restrictive law of judicial standing into the administrative process.

II.

What *should* be the standards for determining standing to appear before an agency? Generalizations are hazardous, for administrative standing questions arise in contexts as diverse as the methods and objectives of the agencies themselves. Nevertheless, the present case suggests some principles that may be broadly applicable.

The starting point in determining administrative standing should be the language of the statutes and

[7] *See also* American Communications Association v. United States, 298 F.2d 648, 650-51 (2d Cir. 1962). Martin-Trigona v. Federal Reserve Bd., 509 F.2d 363 (D.C.Cir. 1975) is exceptional, in that we there sustained a denial of a petitioner's request for a hearing, relying in part on judicial standing concepts. The decision was a limited one, however, and we made it clear that "the different policies applicable to standing before this court and before an administrative agency might in a different context require different concepts of standing." *Id.* at 366 n.10. The denial of administrative standing would have been proper in any event under a functional analysis, *see* Part II *infra*, since the petitioner refused to state the nature of his interest. *Id.* at 367.

regulations that provide for an administrative hearing, appeal or intervention. To be sure, these sources frequently provide no criteria for determining standing, or speak in vague terms of persons "aggrieved," "affected," or having an "interest"—in which case they are of little assistance. On occasion, however, the applicable statutes and regulations do supply specific criteria for determining standing, in which case they should of course be controlling.

An example of a regulation supplying relatively precise standards is 43 C.F.R. § 4.902 (1976), part of the new regulations on ANCSA hearing procedures promulgated after the hearings in the instant cases were completed.[8] This section provides:

> Any party who claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed, or an agency of the Federal Government, may appeal as provided in this subpart. However, a regional corporation shall have the right of appeal in any case involving land selections.

This regulation quite clearly establishes three classes of persons who have standing: those asserting a property interest in land, federal agencies, and regional corporations in land selection cases. It thus provides fairly objective criteria that can be applied without recourse to a more refined analysis.[9]

[8] *See* 40 Fed. Reg. 33172 *et seq.* (1975), *codified as* 43 C.F.R. § 4.900 *et seq.* (1976).

[9] Generally, an appeals court must apply the law—including regulations—in effect at the time it renders its decision, "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. School Bd. of the City of Richmond, 416 U.S. 696, 711 (1974); Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 281-82 (1969). Since the court concludes

More often, however, the statutes and regulations do not provide specific guidelines for determining administrative standing. The regulation actually applied in these cases, for example, refers only to "[a]ny party aggrieved. . . ." 43 C.F.R. § 4.700 (1976).[10] Such a general and indefinite provision suggests no concrete standards for determining who should have standing to appeal. In these circumstances, I believe a functional analysis of administrative standing is appropriate. Such an analysis would examine the nature of the asserted interest, the relationship of this interest to the functions of the agency, and whether an award of standing would contribute to the attainment of these functions.

There is nothing revolutionary about such an approach to administrative standing. Several commentators have suggested adoption of a functional standard.[11] Moreover,

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that the federal agencies and the State of Alaksa had administrative standing under 43 C.F.R. § 4.700, maj. op. at 10, 13, it is unnecessary to consider whether 43 C.F.R. § 4.902 should be applied retrospectively to this case. *See* Nixon v. Sampson, Nos. 75-2194 & 2195 (D.C.Cir., March 22, 1978).

[10] § 4.700 Who may appeal.

> Any party aggrieved by an adjudicatory action or decision of a Department official relating to rights or privileges based upon law in any case or proceeding in which Departmental regulations allow a right of appeal to the head of the Department from such action or decision, should direct his appeal to the Director, Office of Hearings and Appeals, if the case is not one which lies within the appellate review jurisdiction of an established Appeals Board and is not excepted from the review authority delegated to the Director. No appeal will lie when the action of the Departmental official was based solely upon administrative or discretionary authority of such official.

43 C.F.R. § 4.700 (1976).

[11] *See* Crampton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L. J. 359 (1972); Jacks, *The Public and Peaceful Atom: Participation in AEC Regulatory Proceedings*, 52 TEX L. REV. 466 (1974); Shapiro, *supra* note 5; cf. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

the elements of a functional approach can be discerned in our prior decisions—most prominently, in fact, in the very cases cited by appellees for the proposition that judicial standing limitations should govern.

The seminal decision on administrative standing pointing toward a functional approach is *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C.Cir. 1966). We held there that standing to intervene in a Federal Communications Commission license renewal proceeding is not limited to those alleging economic injury or electrical interference, but extends also to responsible representatives of the listening public. We ruled that "the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding." *Id.* at 1002. Given this standard, we could "see no reason to exclude those with such an obvious and acute concern as the listening audience." *Id.* Moreover, we found that the Commission had insufficient resources to fulfill its obligation to assure balanced broadcast programming. Representatives of the listening public, acting as "private attorneys general" enforcing the Commission's Fairness Doctrine, would therefore provide valuable assistance. *Id.* at 1003-04. We specifically rejected the Commission's argument that a broad rule of standing would overwhelm the Commission with "hosts" of protestors, and found that the Commission had authority to adopt rules to screen out spurious petitions and "limit public intervention to spokesmen who can be helpful." *Id.* at 1005.

In *National Welfare Rights Organization v. Finch*, 429 F.2d 725 (D.C.Cir. 1970), we expanded the rationale of *United Church of Christ*, making the functional elements of the analysis even more explicit. We held that organizations of welfare recipients were entitled to take part in hearings conducted by the Department of Health, Education and Welfare to determine if state welfare programs were in conformance with federal standards. A functional-type analysis of the organizations' standing served as an alternative ground for the decision:

> As intervenors in conformity hearings appellants may serve the public interest in the maintenance of an efficient state-federal cooperative welfare system. Appellants' role would be analogous to that of persons accorded standing, not for the protection of their own private interests, but because they are especially well suited to represent an element of the public interest. Thus they serve as "private attorneys general."

Id. at 738. As in *United Church of Christ, supra*, we noted that the "threat of hundreds of intervenors" was more apparent than real. The appropriate way to limit the possibility of abuse was "by controlling the proceeding so that all participants are required to adhere to the issues and to refrain from introducing cumulative or irrelevant evidence," not by "excluding parties who have a right to participate." *Id., quoting Virginia Petroleum Jobbers Ass'n v. FPC*, 265 F.2d 364 n.1 (D.C.Cir. 1959).[12]

These authorities suggest a functional analysis composed of the following factors:

(1) The nature of the interest asserted by the potential participant.

[12] *See also* Marine Space Enclosures, Inc. v. F.M.C., 420 F.2d 577, 590-92 (D.C.Cir. 1969).

(2) The relevance of this interest to the goals and purposes of the agency.

(3) The qualifications of the potential participant to represent this interest.

(4) Whether other persons could be expected to represent adequately this interest.

(5) Whether special considerations indicate that an award of standing would not be in the public interest.

Such a standard would have to be flexible, of course, and the appropriate variables might well vary from one context to another.[13] The important point is that administrative standing should be tailored to the functions of the agency, not to arcane doctrine from another area of the law.

Under such an approach, there can be little doubt that the Secretary acted properly in finding that the United States Fish and Wildlife Service, the National Forest Service, and the State of Alaska had standing to appeal the eligibility determinations of the BIA area director. In fact, although the standing discussion of the Alaska Native Claims Appeals Board, acting for the Secretary,

[13] One important distinction might be between a would-be participant seeking to institute a new administrative hearing or appeal, and one merely seeking to intervene in an on-going proceeding. An award of standing in the former circumstances is clearly more burdensome than in the latter. *See* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 241 (1958). Since intervention generally has no effect on what decisions are reached, or when they are rendered, if might be appropriate in considering requests for intervention merely to focus on (1) whether the potential intervenor represents a point of view that would assist in illuminating the issues; (2) whether he is qualified to represent this point of view; (3) whether other parties to the proceeding could be expected to represent this perspective; and (4) whether there are special considerations that indicate intervention would not be in the public interest.

relied in part on a consideration of judicial standing concepts, it also included an elementary functional analysis.

The federal agencies and the State of Alaska maintained that if certain villages were eligible to take public lands, their own flexibility in selecting such lands would be impaired. The Board found that this interest established "a nexus with the village sufficient to assure the presentation of factual evidence relevant to the village's eligibility." *State of Alaska v. Village of Solomon*, Final Decision of Board and Secretary (Sept. 16, 1974) at 4. Thus, the Board found that the asserted interest was relevant to one of the principal purposes of the Act—determination of eligibility "with the fullest possible command of the relevant facts." *Id.* the board concluded that it was proper to recognize appellants' standing, "particularly when the Secretary's factfinding obligation would be thwarted by a more restrictive approach." *Id.* No suggestion was made by the Board that appellants were not qualified to represent the interest they asserted, that affording them an appeal would result in duplicative presentations, or that there were any considerations of public policy militating against recognizing their standing."

" The Board's functional-type analysis is also found, virtually verbatim, in U.S. Fish & Wildlife Service v. Village of Bells Flats, Final Decision of Board and Secretary (Sept. 20, 1974) at 2-3; and U.S. Forest Service v. Anton Larsen, Inc., Final Decision of Board and Secretary (Oct. 3, 1974) at 2-3. It is alluded to in State of Alaska v. Alexander Creek, Inc., Final Decision of Board and Secretary (Oct. 23, 1974) at 8. The full statement of the analysis in *Village of Solomon* is as follows:

> It is recognized, as argued by the Respondents, that courts have applied [judicial] tests to determine the standing of litigants before them. However, it must also be remembered that the Board is an administrative body, not a court.
>
> The Board acts in this proceeding for the Secretary, who has been directed by Congress in Section 11(b)(3) of the Act to determine village eligibility through consideration of census data or other evidence, and to "make findings of fact in each instance."
>
> • • • •
>
> In carrying out this duty, delegated to it by the Secretary, the Board is authorized, in its discretion, to direct hearings. (43 CFR 2651.2(a)(5); 43 CFR 4.704).
>
> It is clearly the purpose of such hearings to enable the Secretary, through the Board, to fulfill his statutory obligation of deciding village eligibility appeals with the fullest possible command of the relevant facts.
>
> This purpose is best served by recognizing standing of a party who demonstrates a nexus with the village sufficient to assure the presentation of factual evidence relevant to the village's eligibility.
>
> The Board will therefore be guided by a relatively broad concept of standing, particularly when the Secretary's fact-finding obligation would be thwarted by a more restrictive approach.

Under these circumstances, the Board was amptly justified in finding that appellants had standing. Further analysis of standing concepts, judicial or otherwise, was unwarranted and unnecessary.

APPENDIX D

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA

KONIAG, INC., et al., *Plaintiffs*,

v.

THOMAS S. KLEPPE, Secretary of the Interior, *Defendant*.

Civ. A. Nos. 74-1061, 74-1134, 74-1790 to 74-1795, 75-452, 75-485 and 75-1097.

United States District Court
District of Columbia

Nov. 14, 1975.

• • • •

Edward Weinberg, Fredrick D. Palmer, Frederick L. Miller, Jr., John P. Meade, Stephen M. Truitt, Washington, D.C., Allen McGrath, Anchorage, Alaska, F. Conger Fawcett, San Francisco, Cal., for plaintiffs.

Herbert Pittle, Atty., Dept. of Justice, Washington, D.C., for defendant.

MEMORANDUM

GESELL, District Judge.

The eleven plaintiffs have filed separate complaints challenging decisions of the Secretary of the Interior which found each of them ineligible to take land and revenues under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601 *et seq.* (Supp. III, 1973). When it appeared at a status conference that these separate cases raise a number of questions common to one or more of the complaints, plaintiffs and defendant agreed that the cases should be consolidated to hear those questions which could be adequately presented on cross-motions for summary judgment.[1] This was done. The records of the separate

[1] Other issues such as the sufficiency of the evidence in an individual proceeding to support a particular finding by the Secretary were reserved until it could be determined whether or not the common issues, or any of them, are dispositive of the underlying controversy.

administrative hearings involving each of the villages held before the Secretary have been filed with the Clerk of Court to provide necessary support for references to matters raised by the summary judgment motions. In addition, various depositions were taken relevant to certain issues and these are also before the Court. Following elaborate briefing and extended oral arguments continuing over two days the common issues are now before the Court for determination.

Before attempting to identify the various contentions of the parties it is necessary to delineate the nature of the settlement with Alaska Natives accomplished through the Alaska Native Claims Settlement Act and to describe the procedures which were adopted by the Secretary through regulations to carry out his responsibilities under the Act.

The Alaska Native Claims Settlement Act of December 18, 1971, sought to accomplish a fair, rapid settlement of all aboriginal land claims by Natives and Native groups of Alaska without litigation. The history of the legislation is contained in the Conference Report, S.Rep.No.92-581, 92d Cong., 1st Sess., U.S.Code Cong. & Admin.News 1971, p. 2192. Impetus for this legislative settlement came from a realization that the aboriginal claims which had long existed created serious obstacles to development of Alaska's newly discovered oil and other natural resources and raised questions as to Alaska's ability to take dominion over public lands that might otherwise be chosen by it under the provisions of the Alaska Statehood Act and other legislation. Under the Settlement Act, 40 million acres of land and $962,200,000 were to be disbursed to regional corporations and villages that qualified. In exchange, all aboriginal titles and claims were extinguished. The Secretary of the Interior was given the responsibility to administer the complex

program outlined in the legislation. This was a difficult and onerous task since it was to be performed with finality in a brief period without creating a reservation system or lengthy wardship or trusteeship. Adding to this difficulty is the fact that the Act lacks precision in a number of respects and contains ambiguities which are not clarified by the legislative history.

The land and funds made available through the Act are to be divided among thirteen regional corporations in which Natives hold stock and whatever Native villages are found eligible. Congress gave recognition to the obvious fact that some Alaska Natives had abandoned traditional life styles and villages. Settlement of claims with those Natives was to be confined to their entitlement to stock in the Native Regional Corporations which were funded by the statute, 43 U.S.C. §§ 1602(g), 1605, 1606, 1608, 1611 (Supp. III, 1973). In addition, section 12(a) of the Act authorizes Native villages of 25 or more Natives in existence on April 1, 1970, the United States census date, to select out of the public domain substantial tracts of surrounding land. This selection is to be made as specified in section 14, which provides that villages are entitled to acreages depending upon the population of each village and authorizes conveyance of from 69,120 acres to villages having between 25 and 99 Natives to as many as 161,280 acres to villages having 600 or more Natives. Section 12(a), however, provides that no village corporation may select more than 69,120 acres from the National Wildlife Refuge System or from a National Forest. This village land ownership, among other things, assured the continued existence of the traditional life style and economies of the Natives.

Section 3(c) of the Act, 43 U.S.C. § 1602 (Supp. III, 1973), defines "Native villages" as:

> "Native village" means any tribe, band, clan, group, village, community, or association in Alaska listed in sections 1610 and 1615 of this title, or which meets the requirements of this chapter, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives.

Sections 11(b)(1) and 16(a), 43 U.S.C. §§ 1610(b)(1), 1615(a) (Supp. III, 1973), list 215 geographic locations which were considered to be villages presumptively eligible to receive lands and other benefits. Section 11(b)(2), 43 U.S.C. § 1610(b)(2) (Supp. III, 1973), provides:

> Within two and one-half years from December 18, 1971, the Secretary shall review all of the villages listed in subsection (b)(1) hereof, and a village shall not be eligible for land benefits under section 1613(a) and (b) of this title, and any withdrawal for such village shall expire, if the Secretary determines that—
>
> (A) less than twenty-five Natives were residents of the village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; or,
>
> (B) the village is of a modern and urban character, and the majority of the residents are non-Native.
>
> Any Native group made ineligible by this subsection shall be considered under section 1613(h) of this title.

Villages that were not listed might also be eligible for benefits under the Act. Section 11(b)(3), 43 U.S.C. § 1610(b)(3) (Supp. III, 1973), provides:

> Native villages not listed in subsection (b)(1) hereof shall be eligible for land and benefits under this chapter and lands shall be withdrawn pursuant to this section if the Secretary within two and one-half years from December 18, 1971, determines that—

(A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and

(B) the village is not of a modern and urban character, and a majority of the residents are Natives.

Prior to engaging in the review of the 215 places listed in the Act and the numerous additional places not listed in the Act which sought recognition, the Department of the Interior, under the Secretary's direction, conducted rule-making procedures which culminated in the adoption of regulations to govern the mechanics of the decision-making process on Alaska Native village eligibility, 43 C.F.R. Part 2650 *et seq.*, adopted May 30, 1973, effective July 2, 1973, 38 Fed. Reg. 14218.

In implementing these requirements of the Act, the Secretary promulgated the following criteria (43 C.F.R. § 2651.2):

2651.2 (b) Except as provided in subparagraph (4) of this paragraph, villages must meet each of the following criteria to be eligible for benefits under sections 14(a) and (b) of the act:

(1) There must be 25 or more Native residents of the village on April 1, 1970, as shown by the census or other evidence satisfactory to the Secretary. A Native properly enrolled to the village shall be deemed a resident of the village.

(2) The village shall have had on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style and at least 13 persons who enrolled thereto must have used the village during 1970 as a place where

they actually lived for a period of time. *Provided*, That no village which is known as a traditional village shall be disqualified if it meets the other criteria specified in this subsection by reason of having been temporarily unoccupied in 1970 because of an act of God or government authority occurring within the preceding 10 years.

(3) The village must not be modern and urban in character. A village will be considered to be of modern and urban character if the Secretary determines that it possessed all the following attributes as of April 1, 1970:

(i) Population over 600.

(ii) A centralized water system and sewage system that serves a majority of the residents.

(iii) Five or more business establishments which provide goods or services such as transient accommodations or eating establishments, specialty retail stores, plumbing and electrical services, etc.

(iv) Organized police and fire protection.

(v) Resident medical and dental services, other than those provided by Indian Health Service.

(vi) Improved streets and sidewalks maintained on a year-round basis.

(4) In the case of unlisted villages, a majority of the residents must be Native, but in the case of villages listed in sections 11 and 16 of the act, a majority of the residents must be Native only if the determination is made that the village is modern and urban pursuant to subparagraph (3) of this paragraph.

The Secretary's regulations also required that the Juneau, Alaska, Area Office of the Bureau of Indian Affairs review and make determinations not later than December

19, 1973, on all applicant Native village corporations' eligibility for benefits as Native villages under the Act. Prior to the determinations, the Area Director was required to publish proposed decisions, 43 C.F.R. §§ 2651.2(a)(1), (2). Those decisions became final unless protested within 30 days of their date of application by "any interested party," 43 C.F.R. § 2651.2(a)(3). Upon receipt of a protest by an interested party, the Area Director was required to examine and evaluate it and within 30 days render a final decision, 43 C.F.R. § 2651.2(a)(4). These Area Director decisions automatically became final unless an "aggrieved party" appealed to the Secretary of the Interior by filing a notice with the Ad Hoc Board [2] within 30 days of publication (43 C.F.R. § 2651.2(a)(5). The Secretary reserved to himself personally the ultimate decision in each case (43 C.F.R. § 2651.2(a)(5)).

Not all cases were appealed. If an appeal was taken a record on appeal was developed in the following fashion. The Board assigned each appeal to a Department of the Interior administrative law judge for a full *de novo* adversary hearing on a record. At the hearings the "aggrieved" parties were represented mainly by an attorney from the Solicitor's Office of the Department of the Interior. Motions challenging standing were heard and evidence taken. The administrative law judges received proposed findings of fact and heard argument from the parties.

Thereafter, over the protest of plaintiffs, all subsequent proceedings were *in camera*. The decisions of the administrative law judges were forwarded *in camera* to the Board without being served on the villages. The Board then made formal decisions in each case and submitted these to the Secretary *in camera* without service on the villages. Following this, Secretary consulted members of his staff and

[2] Name later changed to Alaska Native Claims Appeal Board, hereinafter ANCAB or the Board.

decided to accept the Board's decisions in each case. It was only at this stage that the villages learned of the result.

The entire process resulted in the following determinations by the Secretary. Of the 215 villages listed in section 11(b)(1) and section 16(a) of the Alaska Native Claims Settlement Act, 191 were determined to be eligible to receive land benefits under the Act, and 17 were determined to be ineligible. Thirty-one villages not listed in the Act applied for a determination of eligibility to receive land benefits, and 12 of these were determined to be eligible, while 19 were determined to be ineligible. Thus a total of 203 villages have been determined to be eligible for benefits under the Act; 191 listed and 12 unlisted.

In this consolidated case, three of the plaintiffs (Uyak, Salamatof and Pauloff Harbor) were "listed" villages, and village corporations were established to claim land and benefits under the Act. The Area Director confirmed that they were in fact qualified. Upon appeal by the Fish and Wildlife Service, these plaintiffs ultimately were determined by the Secretary not to meet the statutory standards for eligibility as Native villages.

The remaining eight plaintiffs were not listed as villages in section 11 of the Act. They each applied to the Area Director for certification as eligible villages pursuant to section 11(b)(3). The Area Director found them qualified. Upon the filing of protests by the Fish and Wildlife Service, the National Forest Service, or the State of Alaska, it was finally determined that they were not in fact eligible as Native villages because they did not meet the conditions specified in that section of the Act and the implementing regulations.

Accordingly, each of these eleven cases was brought to obtain judicial review of those adverse decisions by the Secretary.

The plaintiffs contend that Fish and Wildlife, Forest Service and the State of Alaska were not in fact parties

aggrieved and thus lacked standing to appeal, so that the proceedings before the administrative law judges in each instance and the Board and the Secretary are consequently of no force and effect. Alternatively, they urge that the proceedings on appeal were defective in a number of respects and constitute a denial of due process. In this respect they object, among other things, to the *in camera* treatment of the recommended decisions of the administrative law judges and the Board, and also urge that the proceedings were tainted because of congressional interference. Further objections are raised concerning the legality of the Secretary's regulations in some instances and the asserted failure of the Secretary properly to carry out his decisional responsibilities. All of these matters will be considered herein.

I. *Standing.*

Common to all cases is the threshold question whether the State of Alaska, the United States Fish and Wildlife Service and the National Forest Service had standing as aggrieved parties to appeal determinations made by the Alaska Bureau of Indian Affairs Area Director that each of the plaintiff villages was qualified for benefits under the Act. *See* 43 C.F.R. §§ 4.7000, 2651.2(a)(5). The Fish and Wildlife Service and the Forest Service raise a common question of standing. Basically, the Services argue that since Congress did not intend for an unqualified village to be awarded land from a wildlife refuge or a national forest they have standing as the agencies responsible for these refuges and forests to challenge the eligibility of a village which either will be required or may choose to take some land from their respective domains.

It is true, as plaintiffs argue, that Congress put careful safeguards in the statute designed to minimize the possible adverse effects of such takings. The Alaska Native Claims Settlement Act provides very specifically for protection of the interests of the Fish and Wildlife Service, the Forest Service and the State of Alaska in deference to the potential conflict between village claims and the national wildlife refuge system or the national forests.

Plaintiffs are at some pains to point out the scope and nature of these protections. With respect to the Fish and Wildlife Service, the Act first of all limits the amount of refuge lands which can be selected by a Native village. Alaska Native Claims Settlement Act, § 12(a)(1), 43 U.S.C. § 1611(a)(1) (Supp. III, 1973). It provides for expansion of the boundaries of a national wildlife refuge to replace acreage selected by Native villages out of the refuge. ANCSA, §§ 11(a)(3)(A), 17(a)(7)(I), and 22(e), 43 U.S.C. §§ 1610(a)(3)(A), 1616(a)(7)(I), 1621(e) (Supp. III, 1973). It requires that if land from a refuge is patented to a Native village, and the land is ever sold, provision must be made in the patent for a right of first refusal in the United States to buy back those lands. ANCSA, § 22(g), 43 U.S.C. § 1621(g) (Supp. III, 1973). It further provides that every patent issued which transfers refuge lands to Natives must contain a provision that such lands ". . . remain subject to the laws and regulations governing use and development of such Refuge." ANCSA, § 22(g), 43 U.S.C. § 1621(g) (Supp. III, 1973).

With respect to Forest Service, the Act similarly limits the amount of acreage in a national forest which any Native village may select. ANCSA, § 12(a)(1), 43 U.S.C. § 11(a)(1) (Supp. III, 1973). It also provides for ". . . orderly, planned and [environmentally] compatible . . ." planning of lands received by the Natives from national forests (ANCSA, § 17(a)(7)(I), 43 U.S.C. § 1616(a)(7)(I) (Supp. III, 1973)), and provides that national forest lands selected by a Native village shall be subject to Forest Service management prior to conveyance (ANCSA, § 22(i), 43 U.S.C. § 1621(i) (Supp. III, 1973)). Finally, the statute requires that patents of national forest lands which are issued to Native villages under the Act shall contain extremely restrictive conditions on the use of said lands by the Natives, including a provision that ". . . such lands are [to be]

managed under the principle of sustained yield and under management practices for protection and enhancement of environmental quality no less stringent than such management practices on adjacent national forest lands for a period of twelve years." ANCSA, § 22(k), 43 U.S.C. § 1621 (k) (Supp. III, 1973).

Nonetheless, the Government's point is well taken that some presently immeasurable degree of disadvantage may result if an unqualified village obtains authority over a portion of the lands now in the exclusive care of the United States and that this is sufficient to provide standing. Under the statutory scheme, many of the relevant facts cannot yet be determined, for example, which land will be selected by the villages, which land will be added to the National Wildlife Refuge System to replace that chosen by the villages (43 U.S.C. § 1621(e) (Supp. III, 1973)), or how the villages will in fact use and manage the land (*cf.* 43 U.S.C. § 1621(g) (Supp. III, 1973)). The Government will not be held to an impossible burden of proof. That these and other facts are not now known with certainty does not render the Government's interest too remote or conjectural. Moreover, the Forest Service and the Fish and Wildlife Service have broad mandates to protect our forests and wildlife, *e. g.*, 16 U.S.C. §§ 551, 553; 16 U.S.C. § 742a *et seq.* The Court is particularly reluctant to deny standing to those most likely in fact to have a legitimate concern about these lands and to come forward to protect the public interest, especially where the effect of finding standing is simply to allow adversary proceedings to be held which, if properly conducted, could contribute to fair and informed decision making. Accordingly, the Court finds that the Forest Service and the Fish and Wildlife Service, rather than merely engaging in "an ingenious academic exercise in the conceivable," *United States v. SCRAP*, 412 U.S. 669, 688, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973), have a sufficiently direct stake in the outcome to establish their standing to appeal as "parties aggrieved." *See United*

States v. SCRAP, supra; Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

However, the conclusion that these governmental entities had standing to appeal is not applicable in the cases of Anton Larsen Bay and Bells Flats, and the Court finds that in these two cases standing did not exist.[3] Each of these two villages had made extensive good-faith commitments not to take land from a wildlife refuge or national forest. Even the most theoretical harm was removed by these commitments, and the Court finds that it was only because of improper congressional interference (*see infra*) that the Fish and Wildlife Service appealed in these instances.

Two other plaintiff villages, Solomon and Alexander Creek, were challenged only by the State of Alaska. Alaska did not have standing. The State's only interest was the speculative possibility that at some later time for some undisclosed reason it might, under the Alaska Statehood Act, seek to have land patented to it that would be claimed by these villages. Congress was not unaware of this issue, for it excluded from the definition of "public lands" that could be taken by the villages any "land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969," 43 U.S.C. § 1602(e) (Supp. III, 1973). The failure of the State to bring itself within this statutory provision underscores the conjectural and attenuated nature of its interest here.

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[3] Moreover, in the case of Pauloff Harbor, there has arisen a factual dispute as to whether this village, if eligible, would be entitled to take land from a wildlife refuge. Since this cannot be resolved on cross-motions for summary judgment, the Court makes no determination concerning the standing of the Fish and Wildlife Service to appeal the Area Director's decision on Pauloff Harbor.

Alaska had ample opportunity to select land but did not do so, and one does not have standing merely by appearing in a case for the purpose of keeping one's options open an indefinite period in the future.

Thus, in four of the cases, the appeals were not brought by a proper party and hence were unauthorized and invalid. Accordingly, the final decision of the Bureau of Indian Affairs Area Director in the cases of Anton Larsen Bay, Bells Flats, Solomon and Alexander Creek must be reinstated.

II. *The Fairness and Integrity of the Administrative Process.*

In the other seven cases the Court must now consider the plaintiffs' various challenges to the basic fairness and integrity of the appellate administrative proceedings. Two issues are of major concern. First, it is claimed that the Secretary, who reserved final decision to himself,[4] was prevented from making a rational decision on the records developed because the decisions of both the administrative law judges and the Ad Hoc Board were kept *in camera* and remained undisclosed to the parties until the Secretary had already reached his final decision. This process denied the villages the opportunity to bring to the Secretary's attention any exceptions or objections they might have had to the determinations below.[5] Significantly, although it is not necessary to show the prejudice in each instance, some of the cases were decided adversely to the villages by the Board and the Secretary on grounds that had never been raised before the administrative law judges and of which

[4] It is argued that the Secretary performed a purely ministerial act or residual function but this is not correct. He is bound by his own regulations and the decision was his and his alone.

[5] Indeed, it appears that the Secretary did not even see the proposed findings of fact submitted by the villages to the administrative law judges.

the parties were unaware until the Secretary announced the final result.

The Government argues that there are no legal constraints on the Secretary as to the nature or format of the administrative proceedings. The Court finds this position to be without merit. First, plaintiffs herein had a statutory entitlement under the Act that could not be adversely affected without due process of law. The legislative criteria for village eligibility were clear, specific and objective, and any and all qualified villages would be able to receive the designated benefits. Moreover, listed villages were presumptively eligible for benefits, and the unlisted villages in the instant proceeding assumed a comparable status once the Area Director had found them to be qualified. *See Garfield v. Goldsby,* 211 U.S. 249, 29 S.Ct. 62, 53 L.Ed. 168 (1908). Finally, this is not a situation in which benefits are provided through government largess. Rather, the *quid pro quo* to the Government under the Act was the extinguishment of all aboriginal land claims, and the villages were entitled to be heard on the inseparable issues of the abatement of their land titles and the compensation therefor. *Cf. Cameron v. United States,* 252 U.S. 450, 460-61, 40 S.Ct. 410, 64 L.Ed. 659 (1920); *United States v. Consolidated Mines & Smelting Co., Ltd.,* 455 F.2d 432, 441 (9th Cir. 1971); *Adams v. Witmer,* 271 F.2d 29, 32-33 (9th Cir. 1958). Under these circumstances, the Court concludes that plaintiffs had a sufficient property interest to come within the due process clause.

Supporting plaintiffs' right to due process is section 2(b) of the Settlement Act, 43 U.S.C. § 1601(b) (Supp. III, 1973), which declares that "the settlement should be accomplished . . with maximum participation by Natives in decisions affecting their rights and property." In light of this congressional directive, the Secretary was well advised to make provision in the regulations for adversary proceedings before an administrative law judge. However,

the adversarial nature of the process at the initial stage could not be disregarded or forgotten at later stages. Once the Secretary chose to establish a multi-tiered administrative process and elected to reserve to himself the personal responsibility to make the ultimate decision, he was obligated to provide a consistent structure that did not frustrate basic notions of fairness, impartiality and informed and rational decision making. By unnecessarily foreclosing to himself knowledge of the Natives' contentions as to the underlying issues, the Secretary has deviated from this obligation.

The Government next urges that this defect was harmless error. Whether judged under the Administrative Procedure Act[6] or the more flexible due process concepts of fundamental fairness and a meaningful opportunity to be heard, the Government's contention must be rejected. It is absolutely clear on this record that the *in camera* procedures were inherently unfair and did not comport with the minimum requisite standards.

Closely related to this aspect is the pervasive influence of the so-called Dingell hearings. Honorable John D. Dingell, Chairman of the House Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries, held so-called "oversight" hearings relating to the adminis-

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[6] *See* 5 U.S.C. § 557c) (1970); *Riss & Co. v. United States,* 341 U.S. 907, 71 S.Ct. 620, 95 L.Ed. 1345 (1951) (per curiam), *rev'g* 96 F.Supp. 452 (W.D.Mo. 1950) (three-judge court); *Wong Yang Sung v. McGrath,* 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616 (1950), *order modified,* 339 U.S. 908, 70 S.Ct. 564, 94 L.Ed. 1336 (1950); *Ohio Bell Telephone Co. v. Public Utilities Comm'n,* 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937); *Western Union Division v. United States,* 87 F. Supp. 324, 334 (D.D.C.) (three-judge court), *aff'd per curiam,* 338 U.S. 864, 70 S.Ct. 148, 94 L.Ed. 530 (1949); *Muncie Broadcasting Corp.,* 15 Ad.L. 329 (F.C.C. 1964). *Compare Sofield Transfer Co.,* 115 M.C.C. 280 (1972).

tration of the Alaska Native Claims Settlement Act on June 4, 5 and 12, 1974. A transcript of some 130 pages is of record. Numerous witnesses appeared representing different bureaus and sections of the Department of the Interior, including the Bureau of Indian Affairs and the Fish and Wildlife Service, and representatives of the Forest Service of the Agriculture Department. Of particular significance is the fact that among the witnesses was Kenneth Brown, who served as legislative counsel and chairman of the Alaska Task Force Working Committee of the Department of the Interior and was one of the Secretary's two principal advisors who reviewed the cases personally with him at the time he made his decision in the plaintiff's cases. The hearings took place during the time that the validity of certain claims being advanced by the plaintiffs was being litigated before the Secretary and followed upon earlier correspondence which the Congessman had addressed to various subordinates of the Secretary. The stated purpose of the hearings was to present a forum for discussing the implementation of the Act but in fact the Committee, through its chairman and staff members, probed deeply into details of contested cases then under consideration, indicating that there was "more than meets the eye." The entire rule-making process was re-examined, travel vouchers and other information were sought to probe the adequacy of the investigations made, all papers in the pending proceedings were demanded, the accuracy of data and procedures followed was questioned, and constantly the Committee interjected itself into aspects of the decision-making process. While representatives of Interior indicated the were very concerned about prejudice to the quasijudicial administrative process, and the chair on several occasions denied that it was his purpose to pressure the agencies involved, Representative Dingell stated that he was obliged to confess that he had doubts as to whether the law was being properly carried out. On key issues now in dispute before the Court, representatives

of the Government were obliged to take positions as to the interpretation of the Act. A strenuous effort was made by the chairman to encourage protest and appeals, coupled with comments indicating his clear impression that all that could be done was not being done and that some of the results being reached were contrary to congressional intent. It was following this experience that settlements arranged with two of the plaintiffs, Anton Larsen Bay and Bells Flats, were abandoned by the Department of the Interior because of the hearings. It should also be noted again that when the Secretary reached the crucial point of making his personal decision on the merits of cases that were investigated and critized by the Committee he had as one of his two immediate personal advisors Mr. Brown, who had been subjected to the intervention and subtle harassment of the Legislative Branch.

The leading decision on the issue of congressional interference with a quasijudicial administrative proceeding is *Pillsbury Co. v. Federal Trade Commission,* 354 F.2d 952 (5th Cir. 1966). The *Pillsbury* doctrine has been approved in this jurisdiction. *D. C. Federation of Civic Associations v. Volpe,* 148 U.S. App.D.C. 207, 459 F.2d 1231, 1246-47 (1971), *cert. denied,* 405 U.S. 1030, 92 S.Ct. 1290, 31 L.Ed. 2d 489 (1972), *subsequent appeal,* 520 F.2d 451 (D.C.Cir. 1975); *see also Jarrott v. Scrivener,* 225 F.Supp. 827 (D. D.C. 1964, and cases cited therein.

The Dingell hearings constituted an impermissible congressional interference with the administrative process. This situation presents a disturbing conflict between the Congress and the Executive Branch, and it is the responsibility of the Judiciary in this instance to prevent an impermissible intrusion by one branch into the domain of the other. It is no less the responsibility of the Court to protect the procedural due process rights of litigants and "to preserve the integrity of the judicial aspect of the administrative process." 354 F.2d at 964. It cannot be gainsaid

that the "appearance of impartiality—the *sine qua non* of American *judicial* justice—" was sacrified in this instance. *Id.* "[P]rivate litigants [have a right] to a fair trial and, equally important, [a] right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences," *id.* The appearance of justice was breached and while the complaining party is not required to shoulder the virtually impossible burden of proving whether and in what way the outcome before the agency was actually influenced by the congressional intrusion, the evidence before the Court indicates that the Dingell hearings indeed had a direct and demonstrable effect at least on the cases of Anton Larsen Bay and Bells Flats.

Because of these two factors, the appellate proceedings in all eleven cases must be invalidated and set aside. In four cases, the decision of the Bureau of Indian Affairs Area Director has already been reinstated, *see supra.* In the remaining seven cases the Court must now determine whether the appropriate course is to remand to the Department of the Interior for further proceedings or to accept the Area Director's decision as the last authoritative ruling that was untainted by these two defects. There is nothing before the Court to indicate that the effect of the Dingell hearings has been removed, and they did not occur so long ago that their influence can be presumed to have been dissipated. For this Court to allow further administrative proceedings to be held when the agency has failed to demonstrate the absence of any lingering effect would be to countenance a continuing violation of due process. Apart from this, Congress has been insistent, and properly so, upon a prompt resolution and settlement of the Natives' claims. Key deadlines still must be met by December of this year and the general purpose of the statute would be thwarted by the delays inherent in a remand which could only proceed to proper conclusion when there was assurance that the congressional taint had been re-

moved. Moreover, this is not a question of, in effect, removing the administrative body altogether from decision making, since there is an untainted decision by the Secretary's delegate, the Bureau of Indian Affairs Area Director, which can be reinstated. *Compare Federal Trade Commission v. Cement Institute,* 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948); *Pillsbury, supra,* 354 F.2d at 965. Recognizing that the Government has a particular responsibility to the Natives at least of a quasi-trust character (*see infra*) and considering all of these factors, the Court will not remand but will in all cases reinstate the decision of the Area Director. *Cf. Radio Corp. of America v. United States,* 95 F.Supp. 660, 669 (N.D.Ill.1950) (three-judge court), *aff'd,* 341 U.S. 412, 71 S.Ct. 806, 95 L.Ed. 1062 (1951).

III. *Remaining Issues.*

There are several remaining issues that were sharply contested, briefed and argued before the Court. Normally there would be no need to resolve such issues in view of the above holdings, but in the event that on appeal, if one is taken, the Court's ruling is modified and further proceedings rquired in any of these cases, it is advisable in the interests of a prompt ultimate determination for the Court to indicate briefly is views on these subsidiary questions.

There permeates the entire controversy a dispute as to whether the Secretary at one stage or another violated his trust responsibility to the Alaskan Natives. In the context of this statute, the Court finds that the Secretary was obliged, in a broad sense, to act in the nature of a trustee, which required him, at the least, not to disadvantage the Natives without good cause. This does not resolve the question, however. It must be recognized that under the statute and regulations the Secretary occupied a position as a quasi-judicial officer, and whatever trust responsibility he may have had did not extend so far as to require him to abandon his role as a neutral, impartial

and disinterested decision maker. Clearly Congress did not intend for all issues to be decided in favor of the Natives regardless of the underlying situation. This is particularly true where the interest competing with the Natives' was that of the public, to whom the Secretary as a governmental servant also had a solemn responsibility. In any event, whatever benefits are not awarded to one group of Natives inure under the statute to another group, so that the Secretary's trust obligation was in equipoise and did not require that, in effect, he favor some Natives over others. Under all the circumstances, no breach of trust was shown.

Another important issue is whether or not in village eligibility hearings residence is determined conclusively by the roll prepared by the Secretary pursuant to 43 U.S.C. § 1604 (Supp. III, 1973). The Board and the Secretary took the position that this was not the case, and it appears to the Court that their view is correct. Sections 1610(b)(2)(A), (b)(3)(A) of 43 U.S.C. (Supp. III, 1973), do not refer to the roll at all, but rather provide that this residence determination be based on "the census or other evidence satisfactory to the Secretary." *See also* § 1602(c). Moreover, these same sections state that the Secretary "shall make findings of fact in each instance," a requirement which would be unnecessary if the roll were dispositive. These specific and unambiguous sections must control over the more general language of 43 U.S.C. § 1604. Thus a reexamination of residence is permissible where the eligibility of a village is properly in issue. This, however, is a two-way street and once the matter is opened up the Secretary or his delegate cannot set aside the residence determination in the roll and decrease the number of village residents without also adjusting the figures to add additional residents who were incorrectly excluded. Since the Secretary did refuse to consider increasing the number of residents in the case of Pauloff Harbor, his decision in this regard was erroneous.

Another issue of some moment involves the three listed villages of Uyak, Salamatof and Pauloff Harbor. These villages are presumptively eligible under the statute. However, the Secretary by regulation added eligibility requirements beyond those specified in the Act, *see* 43 C.F.R. § 2651.2(b) (discussed *supra*). No challenge to this is raised by the unlisted villages, which must be "established" villages to qualify for benefits, 43 U.S.C. § 1610(b)(3)(A) (Supp. III, 1973). As to the listed villages, the question is presented whether these regulations are consistent with the Act and within the rule-making power conferred upon the Secretary by 43 U.S.C. § 1624 (Supp. III, 1973). The Court holds that the statutory standards for listed villages are exclusive, and thus these regulations were beyond the authority of the Secretary.

The contention that the Secretary did not act within the statutory deadlines is without merit. It was not the purpose of the statute to prevent orderly quasi-judicial determination of issues which properly had been raised prior to the deadline date.

The Court does not consider the claim that individual Natives should have been made parties to the administrative proceedings. These Natives are not before the Court and the villages are without standing to raise the point. Indeed, recognizing these defects, counsel withdrew this claim at oral argument.

Plaintiffs' motions for summary judgment are therefore granted, and defendant's cross-motions are denied. An appropriate Order is attached.

ORDER

For the reasons stated in the accompanying Memorandum which sets forth the Court's findings of fact and conclusions of law, the motions for summary judgment of each and all of the plaintiffs should be, and hereby are, granted, and the defendant's cross-motions for summary judgment

are denied. Accordingly, in each instance the final decision of the Area Director, Juneau Area Office of the Bureau of Indian Affairs, shall be reinstated and shall constitute the final determination as to village eligibility under the Alaska Native Claim Settlement Act, 43 U.S.C. § 1601 *et seq.* (Supp. III, 1973).

So ordered.

APPENDIX E

UNITED STATES DEPARTMENT OF THE INTERIOR
ALASKA NATIVE CLAIMS APPEAL BOARD

P. O. Box 2433
ANCHORAGE, ALASKA 99510

BUREAU OF SPORT FISHERIES & WILDLIFE, *Appellant*

v.

VILLAGE OF UYAK, KONIAG, INC., and BUREAU OF INDIAN AFFAIRS, *Respondents*

ANCAB #VE 74-11

Involving the eligibility of the Village of Uyak under the Alaska Native Claims Settlement Act

DECISION

Preface

This is a decision on the eligibility of the village of Uyak, Alaska, for status as a Native village under the Alaska Native Claims Settlement Act of December 18, 1971, 85 Stat. 688, 43 U.S.C., Sec 1601 et seq., hereinafter referred to as the Act, and the Secretary of the Interior's Rules and Regulations on Alaska Native Selections, 43 CFR, 2650, *et seq.* Status as a village confers certain statutory benefits under the Act, including the right to select substantial quantities of land and receive patent conferring the surface rights associated with it. Subsurface rights to village lands may be patented to the regional corporation for the region in which the village is located.

The Act in Section 3(c) defines the term "Native village" as "any tribe, band, clan, group, village, community, or association in Alaska listed in sections 11 and 16 of the Act, or which meets the requirements of this Act, and which the Secretary determines was, on the 1970 census enumera-

tion date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more natives."

Statutory criteria for village eligibility are contained in Section 22(b)(2) of the Act, which provides:

> Within two and one-half years from the date of enactment of this Act, the Secretary shall review all of the villages listed in subsection (b)(1) hereof, and a village shall not be eligible for land benefits under subsections 14(a) and (b), and any withdrawal for such village shall expire, if the Secretary determines that—
>
> (A) less than twenty-five Natives were residents of the village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; or,
>
> (B) the village is of a modern and urban character, and the majority of the residents are non-Native.

Implementing regulations in 43 CFR 2651.2(b) provide:

> (1) There must be 25 or more Native residents of the village on April 1, 1970, as shown by the census or other evidence satisfactory to the Secretary. A Native properly enrolled to the village shall be deemed a resident of the village.
>
> (2) The village shall have had on April 2, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style and at least 13 persons who enrolled thereto must have used the village during 1970 as a place where they actually lived for a period of time: *Provided,* That no village which is known as a traditional village shall be disqualified if it meets the other criteria specified in this subsection by reason of having

been temporarily unoccupied in 1970 because of an Act of God or Government authority occurring within the preceding 10 years.

(3) The village must not be modern and urban in character. A village shall be considered to be of modern and urban character if the Secretary determines that it possessed all of the following attributes as of April 2, 1970:

(i) Population over 600.

(ii) A centralized water system and sewage system that serves a majority of the residents.

(iii) Five or more business establishments which provide goods or services such as transient accommodations or eating establishments, specialty retail stores, plumbing and electrical services, etc.

(iv) Organized police and fire protection.

(v) Resident medical and dental services, other than those provided by Indian Health Service.

(vi) Improved streets and sidewalks maintained on a year-round basis.

(4) In the case of unlisted villages, a majority of the residents must be Native, but in the case of villages listed in sections 11 and 16 of the Act, a majority of the residents must be Native only if the determination is made that the village is modern and urban pursuant to subparagraph (3) of this paragraph.

Regulations in 43 CFR 2651.2(a) establish a procedure for determining whether a village meets the above criteria for eligibility. The determination is made by the Director, Juneau Area Office, Bureau of Indian Affairs, by a process involving publication of a proposed decision, subject to protest by interested parties; consideration of protests;

and publication of a final decision on village eligibility which may be appealed to the Secretary. Appeals to the Secretary are made to an ad hoc board which he has personally appointed, at least one member of which must be familiar with Native village life. Appeals to the Board are governed by applicable regulations in 43 CFR 4.700-4.704.

43 CFR 4.704, as amended January 21, 1974 (39 F.R. 2366) provides:

> Any hearing on such appeals shall be conducted by the Ad Hoc Appeals Board or a member or members thereof, or by an Administrative Law Judge of the Office of Hearings and Appeals and shall be governed insofar as practicable by the regulations applicable to other hearings under this part.

The Ad Hoc Appeals Board has subsequently been designated the Alaska Native Claims Appeal Board and will hereinafter be referred to as the Board.

The Village of Uyak is listed in Section 11(b)(1) of the Act, and was found eligible by the Director, Juneau Area Office, Bureau of Indian Affairs in a decision published in the Federal Register on December 12, 1973.

The decision was appealed by the Bureau of Sports Fisheries and Wildlife, hereinafter referred to as the Appellant, on January 11, 1974. The Bureau of Indian Affairs, the Village of Uyak, Inc., and the Regional Corporation of Koniag, Inc., responded to the appeal. Following receipt and consideration of briefs and motions and issuance of certain preliminary rulings, the Board directed that a de novo hearing be conducted on May 16, 1974, in Kodiak, Alaska, by an Administrative Law Judge. All parties appeared by counsel, and were given the opportunity to present oral argument and evidence, to cross-examine opposing witnesses, and to submit proposed findings of fact and conclusions of law after receipt of the hearing transcript. The record compiled in this proceeding and now before the

Board consists of the BIA case file, the Board's file containing the Notice of Appeal, pleadings, briefs, and motions and preliminary rulings thereon by the Board; exhibits submitted by the parties and admitted into evidence at the hearing; the hearing transcript; proposed findings of fact and conclusions of law submitted by the parties; and a recommended decision submitted by the Administrative Law Judge to the Board. It is on this record taken as a whole that the Board reaches its decision.

Issues

The appellant contends that the decision of the Area Director was in error because (1) there were not 25 or more Native residents of the village on April 1, 1970, (2) the village did not have on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the natives' own cultural patterns and life style, and (3) at least 13 persons who enrolled thereto did not use the village during 1970 as a place where they actually lived for a period of time.[1]

Decision of Administrative Law Judge

Findings

The Administrative Law Judge made the following findings in his recommended decision submitted to the Board: (ALJ Decision 18-19, 21)

1. The Appellant presented a prima facie case that as of April 1, 1970, the village of Uyak did not have

[1] The parties stipulated at the hearing (1) that the proviso in 43 CFR 2651.2(b)(2) relating to villages that were temporarily unoccupied in 1970 because of an Act of God or government authority occurring within the preceding 10 years is not applicable in this case (Tr. 4); (2) that the village or site is not modern and urban in character within the meaning of 43 CFR 2651.2(b)(3) (Tr. 4); and (3) that the village or site has an identifiable physical location from the standpoint that is shown on maps (Tr. 5).

an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style.

2. The Appellant did not present a prima facie case that thirteen Natives enrolled to Uyak did not use the village site during 1970 as a place where they actually lived for a period of time.

3. The Appellant presented a prima facie case that there were not 25 or more Native residents of the village on April 2, 1970. (This finding is conditioned on the Board's reversal of the Judge's rulings on a motion to dismiss the appeal on the grounds that the Appellant lacked standing, which will be discussed hereinafter.)

Rulings on Motions

Seven motions were presented at the hearing and denied by the Administrative Law Judge subject to his possible reconsideration. (ALJ Decision 3-4)

The Judge did not reconsider his ruling on the following motions, numbered 1, 4, and 5 in his decision and therefore his denial of these motions stands. The Board concurs. The first motion does not merit discussion and as to the other two, Respondents had adequate notice before the hearing that these questions would be in issue.

1. A motion by the appellant to dismiss the Bureau of Indian Affairs from the proceedings on the ground that the agency is not properly a party to the proceedings.

4. A motion by the respondents to exclude as an issue the question of whether there were 25 or more Native residents of the village on April 1, 1970, inasmuch as the issue was not timely raised in the notice of appeal or in supporting documents.

5. A motion by the respondents to exclude as an issue the question of whether the village had on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives' own culture patterns and life style on the ground that while the issue was raised in the notice of appeal, it was not argued nor referred to in the appellant's supporting documents.

The Judge upon reconsideration again denied the motion numbered "2" in his decision, to dismiss the appeal because of the failure of the appellant to timely serve a copy of the notice of appeal and statement of reasons for the appeal on other parties. The Board concurs, for the following reasons, which are adopted from the Judge's decision. (ALJ Decision 9-11)

Respondents contend that the appeal should be dismissed for failure to serve the notice of appeal on the village of Uyak, Koniag, Inc., and other parties listed in the regulations. They argue: first, that service of the notice of appeal on the parties must be made contemporaneously with the filing of the notice of appeal; second, that failure to timely serve the notice of appeal is jurisdictional and may not be waived; and third, that even if failure to serve timely may be waived, there are not grounds for doing so in the instant case.

The first contention must be rejected. The applicable regulation, 43 CFR 4.701, merely states that a certificate of service accompany the notice of appeal. Nowhere does it imply that service be made prior to or simultaneously with the filing of the notice of appeal. The common practice in the Department is for appellants to state that on a specified date a copy of the notice of appeal was mailed to certain named parties. There is no requirement that the certificate state that the notice of appeal was *received* by such parties as of a date certain. Indeed, the regulation

itself says the certificate shall set forth "the names of the parties served, their addresses, and the dates of *mailing.*" (Emphasis supplied.) Proof of service is usually tendered after the receipt of the notice of appeal. *See e.g.,* 43 CFR 4.401(c)(2).

Secondly, failure to serve a notice of appeal is not jurisdictional. Failure to timely *file* a notice of appeal is jurisdictional and dismissal is mandated in such cases. *Cf. Tagala* v. *Gorsuch,* 411 F2d 589 (9th Cir. 1969). It is the receipt of the notice of appeal which activates the appellate jurisdiction. Service of the notice of appeal has no effect thereon. The applicable regulations in the case at bar do not require dismissal of the appeal. By comparison, 43 CFR 4.402, which regulates appeals to the Interior Board of Land Appeals, provides in relevant part, that:

> An appeal to the Board *will be subject* to summary dismissal by the Board . . .
>
> (b) If the notice of appeal is not served upon adverse parties within the time required. . . . (Emphasis supplied.)

The Board of Land Appeals, in interpreting this regulation, has held that dismissal is discretionary, not mandatory. *Allen M. Boyden,* 2 IBLA 128 (1971). Inasmuch as the Board of Land Appeals regulation has been construed as discretionary, a *fortiori,* acceptance of the late service of the notice of appeal on the village of Uyak and Koniag, Inc., under regulations which do not provide for a summary dismissal, must be seen as involving the exercise of discretion.

The rationale animating the service requirement is a concern that persons be given notice of possible actions which might adversely affect their interests. As a practical matter, the Alaska Native Claims Appeal Board File, ALJ Ex. 2, indicates that the attorney for both the village and regional corporations had knowledge of the appeal within

four days of its filing. Actually the respondents probably had notice of the appeal as a result of a telephone communication with the Board sooner than if the documents had been mailed at the time the notice of appeal was filed. Respondents have shown no injury from this slight delay. Regarding the other persons required to be served, it is to be noted that none of them appeared in this case despite the fact that all were eventually served. In the absence of a showing of any injury, the Board denies the motion to dismiss the appeal for lack of timely service of the notice of appeal on respondents.

The Administrative Law Judge upon reconsideration granted the motion, numbered "3" in his decision, to dismiss the appeal on the grounds that the Appellant lacked standing to appeal. (ALJ decision, 3.) The Judge concluded upon analysis of the legal briefs and evidence presented at the hearing that, (1) Appellant was not precluded from appeal because of its status as an agency within the Department of Interior; but (2) Appellant failed in this case to allege injury in fact sufficient to entitle it to standing. (ALJ decision 4-9)

The Board concurs in the Judge's first conclusion, but disagrees with the second. Therefore, the Board reverses the ruling of the Judge and denies Respondents' motion to dismiss on the grounds that the appellant lacked standing to appeal. The Board's reasons for denial of this motion will be discussed herein.

The Administrative Law Judge upon reconsideration granted the motion, numbered "6" in his decision, to exclude as an issue the question of residence of persons enrolled as residents of the village on the official roll on the grounds that the residence of such persons has been determined and is not subject to collateral attack or redetermination in this proceeding. (ALJ decision 3).

The Judge after lengthy analysis concluded that such a redetermination would be contrary to the intent and

purpose of the Act and applicable regulations. (ALJ decision 11-15) After careful consideration of the Judge's interpretation and of legal briefs filed by the parties, the Board reaches the opposite conclusion.

While the issue raised by this motion is not dispositive of the instant appeal, it is of critical importance to the Board's jurisdiction and to other appeals before the Board. The Board reverses the ruling of the Judge and denies Respondent's motion to exclude as an issue the question of residence of persons enrolled as residents of the village. The Board's reasons for denial of this motion will be discussed herein.

The Judge upon reconsideration denied Respondents' motion, numbered "7" in his decision, to dismiss the appeal or grant summary judgment on the ground that Appellant had not presented a *prima facie* case. (ALJ decision 3.) The Judge concluded that (1) Appellant presented a prima facie case that as of April 1, 1970, the village of Uyak did not have an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and lifestyle; (2) Appellant did not present a prima facie case that thirteen Natives enrolled to Uyak did not use the village site during 1970 as a place where they actually lived for a period of time; and (3) Appellant presented a prima facie case that there were not 25 or more Native residents of the village on April 1, 1970. (ALJ decision 18-21).

The Judge's ruling is of course conditioned upon the Board's denial of Respondents' motion to dismiss the appeal for lack of standing; and his third conclusion, noted above, depends upon the Board's denial of Respondents' motion; "6". The Board has denied both motions, and concurs in denial of the motion now under discussion for reasons which will be discussed herein.

Decision of the Alaska Native Claims Appeal Board

Rulings on Motions

The Boards rulings on motions before both the Board and the Administrative Law Judge have been stated in the preceding discussion of the Judges's decision. The Board's reasons for reversal of the Judge's rulings and denial of Respondents' third motion, dealing with the standing of the Appellant, and Respondents' sixth motion, dealing with redetermination of residence of Natives enrolled to the village, are as follows.

Standing

Appellant's standing is challenged on the grounds that they cannot be a "party aggrieved" within the meaning of 43 CFR 4.700 because, as a Government agency, they are not eligible for status as a party and because they have failed to assert a real injury.

The Board is unable to accept the general proposition that agencies of a Department do not have the capacity to appeal decisions of other agencies within the same Department to the head of that Department. In *Margaret Chicharello,* 9 IBLA 124 (1972), the Interior Board of Land Appeals ruled that the Bureau of Indian Affairs had standing, in its official capacity, to appeal a decision of the New Mexico State Director, Bureau of Land Management, disposing of lands under the Public Sale Act, 43 U.S.C. 1171 (1970), and the Recreation and Public Purposes Act, 43 U.S.C. 869 (1970).

Neither the Act nor its legislative history can be construed as affirmatively prohibiting the recognition in the proper circumstances, of an agency as an aggrieved party. The fact that Congress made no express provision for the formal participation of the Bureau of Sports Fisheries and Wildlife in the determination of village eligibility cannot be read as a constructive denial of standing.

Except for Section 2(b) of the Act which states "the settlement should be accomplished rapidly . . . with maximum participation by Natives in decisions affecting their rights and property . . .", the Act does not expressly contemplate participation by parties other than the Secretary in the determination of village eligibility. . . . A logical result of respondents' argument would be that no one could appeal a decision certifying a village as eligible since Congress had not specifically so provided. The Board rejects this argument.

Respondents' contention, that Appellant lacks standing as an aggrieved party because of a failure to assert sufficient injury, must be examined carefully. It is helpful to review the rationale and development of the concept of standing.

The requirement of standing dictates that each party to litigation should have some interest therein, and operates to protect both individual parties, and the judicial process. This requirement recognizes that it is intrinsically unfair to expose an individual party to the trouble and expense of a frivolous suit, instigated by an opposing party who has suffered no real harm from the actions of the defendant. It also recognizes the reliance of the court, in the adversary system, on the ability of the parties before it to present relevant evidence. The issue of standing focuses on the party seeking to get his complaint before the court, to ascertain that he has such a personal stake in the outcome as to assure the "concrete adverseness" which sharpens the presentation of issues on which the court depends. *Flast* v. *Cohen,* 20 L Ed 2d 947 (1968; *Baker* v. *Carr,* 7 L Ed 2d 663 (1962).

Pursuing this concept, the courts have developed a dual test of standing; to have standing, a party must allege injury in fact; to an interest within a zone of interest protected by the statute or constitutional guarantee invoked. *Association of Data Processing Service Organiza-*

tions v. *Camp*, 25 L Ed 2d 184 (1970); *Barlow* v. *Collins*, 25 L Ed 2d 192 (1970). Not only must the injury alleged be to a cognizable interest, but the party alleging it must himself be among the injured. *Sierra Club* v. *Morton*, 31 L Ed 2d 636. The injury must be real, not remote or speculative; a plaintiff must allege "that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." *U.S.* v. *SCRAP*, 37 L Ed 2d 254 (1973).

It is recognized, as argued by the Respondents, that courts have applied these tests to determine the standing of litigants before them. However, it must also be remembered that the Board is an administrative body, not a court.

The Board acts in this proceeding for the Secretary, who has been directed by Congress in Section 11(b)(2) of the Act to determine village eligibility through consideration of census data or other evidence, and to "make findings of fact in each instance."

Part of this statutory fact finding responsibility has been delegated to the Director, Juneau Area Office, of the Bureau of Indian Affairs in that it is his duty under regulations in 43 CFR 2651.2 to investigate the villages listed in the Act and publish decisions on their eligibility. It is these decisions which are appealed to this Board, and it is the Board's duty to decide, subject to the approval of the Secretary, whether these decisions were correct.

In carrying out this duty, delegated to it by the Secretary, the Board is authorized, in its discretion, to direct hearings. (43 CFR 2651.2(a)(5); 43 CFR 4.704)

It is clearly the purpose of such hearings to enable the Secretary, through the Board, to fulfill his statutory obligation of deciding village eligibility appeals with the fullest possible command of the relevant facts.

This purpose is best served by recognizing standing of a party who demonstrates a nexus with the village sufficient to assure the presentation of factual evidence relevant to the village's eligibility.

The Board will therefore be guided by a relatively broad concept of standing, particularly when the Secretary's fact finding obligation would be thwarted by a more restrictive approach.

This is consistent with the approach followed in other proceedings before the Department of the Interior. In *Navajo Tribe of Indians* v. *Utah*, 12 IBLA 5, 80 I.D. 441, the Tribe was accorded standing to challenge issuance of a confirmatory patent to Utah, based on prior occupancy of the patented lands by individual Navajos—although such occupancy, if proven would have defeated the Tribe's claim to, and interest in, the lands. In *Crooks Creek Commune*, 10 IBLA 243 (1973) the Interior Board of Land Appeals recognized standing of a commune consisting of some ten people to appeal denial of the proposed logging of lands adjacent to their property, despite the fact that the Commune asserted no legal interest in such lands and despite uncertainty as to the group's legal status as an entity.

It must also be remembered that the "injury in fact" test imposed by the courts is itself a liberal standard. Denial of standing to the Sierra Club in *Sierra Club* v. *Morton*, 31 L Ed 2d 636, was based on the Club's failure even to allege that it or its members would be affected by the action complained of, rather than on the type of harm alleged. And in *U.S.* v. *SCRAP*, 37 L Ed 2d 254 (1973), the court deemed plaintiffs to have alleged perceptible harm based on allegations that their use of natural resources in Washington, D.C. area would be disturbed by the adverse environmental effects of nonuse of recyclable goods, which plaintiffs asserted would result from a railroad freight surcharge on such goods.

Appellant Bureau of Sports Fisheries and Wildlife did not allege standing in its Notice of Appeal and Appeal Brief. It submitted with its appeal brief statements of five persons purporting to contradict the findings of the Area Director, BIA, in support of his decision that the village was eligible. The statements of two pilots, a guide, and a salmon fisherman indicated that the village was unoccupied in 1970; the statement of June Williams indicated that she was the census taker for Uyak Bay and that she did not stop in Uyak in 1970 because her aircraft pilot told her nobody lived there.

Appellant then alleged, in defense of Respondents' motion to dismiss for lack of standing that a decision of eligibility of the village of Uyak would lead to severe damage to Alaskan wildlife refuges under its care and stewardship, and further asserted that the Board as a factfinding and review body for the Secretary should broadly grant standing to parties potentially able to impart information to the Secretary.

The injury alleged by Appellant arises from the fact that Uyak is located in close proximity to the Kodiak National Wildlife Refuge, and the village, if eligible, would be entitled to select lands within the Refuge and receive patent conferring the surface rights to such lands. Section 12(a)(1) of the Act limits the lands which a village may select within a Refuge to a maximum of 69,120 acres.

Respondents argue that the injury to the refuge inherent in the loss of such a substantial quantity of land are ameliorated by other provisions in the Act. They point out that under Sections 12(a)(1) and 14(f) of the Act, the Regional Corporation for the Region in which the village is located does not receive subsurface rights to village lands within the refuge; that under Section 22(e), the Secretary may add to the Refuge other public lands in Alaska, to replace those selected by a village; and that under Section 22(g), the United States reserves a right of

first refusal if village land rights within the refuge are ever sold, and such lands remain subject to the laws and regulations governing use and development of the refuge.

However, the Board is not persuaded that these provisions operate to deprive Appellant of standing in this appeal. In allowing village selections within wildlife refuges, Congress clearly chose between competing policies. In limiting village rights to such lands, through the provisions referenced above, Congress clearly recognized and sought to mitigate the potential for adverse effects on the refuge caused by its choice. It would be an unwarranted assumption, however, to conclude that these provisions completely ameliorated the injury.

Under cross-examination at the hearing, Mr. Gerry Atwell, present Manager of the refuge, testified that the passage of lands within the refuge from public to private ownership would necessitate a dual management plan and require the expenditure of time on this plan, to the detriment of research and wildlife management. (Tr. pp. 120, 121.) He also testified to the unique character of lands in the refuge:

> Q. (By Mr. Bruce) Is it also not correct that in Section 12 of the Act that you can, if the Secretary determines it is necessary, to secure additional land than lands selected by you—so, in other words, the Act really—not only does it (not) harm you, but it could be considered as giving you twice as much land as you had the first time on the basis of selection.
>
> A. This is one way it could be looked at, yes.
>
> Q. Would you consider that harmful or helpful to wildlife habitat?
>
> A. Of course, we are concerned here mainly with bear, and the situation at Kodiak is a unique echo system (*sic*), and if the Island were not available, say, in total

> for bear refuge, and we had to go someplace else, we could never completely duplicate Kodiak Island, as far as bear habitant is concerned. (Tr. p. 122)

Both Mr. Atwell and Mr. Hensel, a former manager of the Refuge, revealed considerable uncertainty under cross-examination as to the consequences of village selections in the refuge, and the effect of mitigating provisions in the Act. (Tr. pp. 118-119, 129, 146-150). However, as both witnesses' training and experience is in game management rather than interpretation of the law, the Board assigns less weight to this testimony than to Mr. Atwell's testimony on bear habitat and management problems quoted above. The latter is clearly within Mr. Atwell's field of expertise, and the Board considers it significant.

It further appears to the Board that Respondent's reliance on the mitigating provisions in the Act, to negate Appellant's injury, may be misplaced. These provisions are arguably irrelevant to the injury complained of; i.e., that refuge lands would pass into the ownership of a village not eligible under the Act to receive them. The operation of statutory safeguards when refuge lands pass to a qualified village should not foreclose Appellant from challenging the certification of a village which it believes to be ineligible. This Board is the proper forum for such a challenge.

Respondents have argued that the Act must be liberally construed in favor of the Natives wherever any ambiguity exists in the statutory language. The cases cited on this point, however, are dealing specifically with the "traditional guardian-ward relationship between the United States and the Indians" which has been the relationship between the Federal Government and the Native people in the lower 48. *Squire* v. *Capoeman,* 351 U.S. 1; *Carpenter* v. *Shaw,* 280 U.S. 363. As is emphasized time and time again in the legislative history of the Act, Congress intended this legislation to be "a more just and, hopefully,

a wiser solution than has been typical of our country's history in dealing with Native people in other times and in other states. S. Rep. No. 405, 92d Cong., 1st Sess. 61-62 (1971). The Act "intends to avoid prolonged legal or property distinctions or implications of wardship based upon race." Id. at 80.

Further, in the specific cases involving village eligibility appeals, the legal doctrine of liberal statutory construction in favor of Indians loses its meaning because of Section 12(b) in the Act:

> The difference between twenty-two million acres and the total acreage selected by Village Corporations pursuant to subsection (a) shall be allocated by the Secretary among the eleven Regional Corporations (which excludes the Regional Corporation for Southeastern Alaska) on the basis of the number of Natives enrolled in each region. Each Regional Corporation shall reallocate such acreage among the Native villages within the region on an equitable basis after considering historic use, subsistence needs and population. The action of the Secretary or the Corporation shall not be subject to judicial review.

If an unqualified village is certified, it receives land benefits at the expense of those properly certified Native villages and thus deprives other Native stockholders of land benefits to which they would otherwise be entitled.

For these reasons, the Board concludes that Appellant has standing to appeal.

RESIDENCE

Board's Jurisdiction to Review Residence

The question of the Board's jurisdiction to review the residence of individuals enrolled to a village has been preserved by the Respondents.

In connection with certain motions to dismiss, the Board has previously ruled on this question as follows:

> As to the assertion that certain issues relating to enrollment are outside the Board's jurisdiction:
>
> (a) Enrollment for purposes of determining the status and eligibility of the individuals as Alaska Natives is outside the jurisdiction of the Board, and the Board will not hear appeals from Decisions of the Enrollment Coordinator.
>
> (b) The Enrollment Coordinator is not a necessary party before the Board because the only administrative determination properly appealed and within the Board's jurisdiction on this appeal is the Final Decision of the Area Director on the eligibility of the village. . . .
>
> (c) The regulations of 43 CFR § 2651.2(b)(1) provide for an investigation and examination by the Area Director of "available records and evidence that may have a bearing on the character of the village and its eligibility."
>
> (d) The regulations in 43 CFR § 2651.2(b)(1) direct the Area Director to consider the residence of Natives "properly" enrolled to the village as shown on the roll, but also direct the Area Director to consider the census and other evidence.
>
> (e) Since the regulations thus recognize that the determinations of village eligibility and enrollment are separate decisions, made by separate officers, under separate procedures, this Board has jurisdiction to review the final decision of the Area Director on the eligibility of the village . . . but is not required to review the enrollment of the individuals as determined by the Enrollment Coordinator.
>
> Therefore, in deciding appeals from the Area Director's decisions on village eligibility, where the question of whether a village has the requisite minimum of 25 Native residents, as set forth in 43 CFR § 2651.2(b)(1), is in issue, the Board will consider evidence on such questions including, but not limited to, evidence of residence as shown on the roll.—Order Denying Motion to Dismiss, dated March 25, 1974.

This order constitutes a ruling by the Board that it does have jurisdiction to determine the residence of enrolled Natives in connection with the determination of village eligibility.

Basis of Jurisdiction on Residence

This decision is based on construction of the Act and applicable regulations.

Section 5(a), 43 U.S.C. Section 1604(a), of the Act provides:

> The Secretary shall prepare within two years from the date of enactment of this Act a roll of all Natives who were born on or before, and who are living on, the date of the enactment of this Act. *Any decision of the Secretary regarding eligibility for enrollment* shall be final. (Emphasis added)

The finality of the Secretary's decision goes to eligibility, i.e., determination of sufficient blood quantum for individual placement on the Roll.

Section 5(b), 43 U.S.C. Section 1604(a), of the Act provides:

> The roll prepared by the Secretary *shall show* for each Native, among other things, the region and the village or other place in which he resided on the date of the 1970 census enumeration, and he shall be enrolled according to such residence. (Emphasis added)

There is no inference of finality of decision insofar as the residence of individuals on the roll is concerned, according to the language in the Act. However, the language "shall show" establishes a strong presumption of the correctness of the residency shown on the Roll. To interpret otherwise would lead to the conclusion that the Roll, insofar as it presumes to establish residence, is a futile endeavor.

Finally, the Roll signed by the Bureau of Indian Affairs Enrollment Coordinator and approved by the Secretary on December 17, 1973, certifies only that persons listed on the Roll were determined to be eligible for enrollment as Alaska Natives.

> Upon completion, the Coordinator shall affix to the Roll a certificate indicating that to the best of his knowledge and belief the Roll contains only the names of persons who were determined to meet the requirements for enrollment as Alaska Natives. The Roll shall be submitted to the Secretary for approval. (25 CFR 43h.9)

The differing language of the statute regarding eligibility and residency on the roll reflects a unique Indian enrollment required by the Alaska Native Claims Settlement Act. Since the settlement involves both land and money entitlements, and since these settlement entitlements accrue, in most part, (exceptions in § 14(h)) to regional and village corporations and enrollee-stockholders of these corporations, the roll had first to establish who was eligible to participate in the benefits of the settlement—i.e., who was an Alaskan Native. Second, the roll had to provide the basis for determining the kinds of benefits an individual would receive—i.e., whether as a stockholder of a village corporation and/or, a stockholder of a regional corporation. Third, the roll had to provide, on the basis of an individual's claimed residence, information as to the proportional amount of and and money entitlements the village and

regional corporations will receive insofar as these are based on population.

Certification of the roll with a final determination as to eligibility of Natives and a showing of residency to determine individual benefits and assignment of proportional money and land entitlements to the village and regional corporations occur, under the timetable in the Act, prior to a determination of village eligibility.

Determination of village eligibility, under the Act and regulations, occurs after completion of the roll, but nevertheless requires a second round of fact finding.

Section 3(c), 43 U.S.C. Section 1602(c), of the Act provides:

> "Native village" means any tribe, band, clan, group, village, community, or association in Alaska listed in Sections 11 and 16 of this Act, or which meets the requirements of this Act, and *which the Secretary determines* was on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, *who shall make findings of fact in each instance*), composed of twenty-five or more Natives. . . . (Emphasis added).

The determination by the Secretary as to what qualifies as a Native village must be based on findings of fact, according to the language of the statute.

Section 11(b)(2), 43 U.S.C. Section 1602(c), of the Act provides:

> Within two and one-half years from the date of enactment of this Act, the Secretary *shall review* all of the villages listed in subsection (b)(1) hereof, and a village shall not be eligible for land benefits under subsections 14(a) and (b), and any withdrawal for such villages shall expire *if the Secretary determines that*—

> (A) less than twenty-five Natives were residents of the village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; or,
>
> (B) the village is of a modern and urban character and the majority of the residents are non-Native. (Emphasis added)

Section 11(b)(3), 43 U.S.C. Section 1610(b)(3), of the Act provides:

> Native villages not listed in subsection (b)(1) hereof shall be eligible for land and benefits under this Act and lands shall be withdrawn pursuant to this section *if the Secretary* within two and one-half years from the date of enactment of this Act, *determines* that—
>
> (A) *twenty-five or more Natives were residents* of an established village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and
>
> (B) the village is not of a modern and urban character, and a majority of the residents are Natives. (emphasis added)

The statutory language mandates a Secretarial review and factfinding before final determination of the eligibility of a village, and the mandate is inclusive as to the requirements for eligibility—25 residents of a village on April 1, 1970, and that the village not be of a modern and urban character.

Again, under the timetables in the Act, decisions as to eligibility and a showing of residency occur first: "The Secretary shall prepare *within two years* from the date of enactment of this Act, a roll. . . ." § 5(a) (emphasis

added). "*Within two and one-half years* from the date of enactment of this Act, the Secretary shall review all of the villages. . . ." § 11(b)(1) and (2) (Emphasis added)

Because the compilation and certification and the roll precedes in time the determinations of village eligibility, Congress had the opportunity to require that residency as indicated on the roll was to be conclusive for the purposes of determining village eligibility. The fact that Congress did not so provide indicated that Congress did not intend for the residency as indicated on the roll to be conclusive for such purposes.

Instead, Congress mandated that the Secretary, with the roll completed and information on it available to him, make a review and finding of fact on every village to determine whether it was, on the April 1, 1970 census date, composed of 25 Native residents and was not modern and urban in character.

If the residency as shown on the roll is, as Respondents argue, conclusive on its face, why did Congress specifically direct the Secretary to make a review and findings of fact in the determination of 25 residents?

Interior Department regulations affecting Native land selection reflects compliance with the Congressional factfinding and review mandate in 43 CFR Part 2650.

§ 2651.2(a):

> Pursuant to Sections 11(b) and 16(a) of the Act, the Director, Juneau Area Office, Bureau of Indian Affairs, shall review and make a determination not later than December 19, 1973, as to which villages are eligible for benefits under the Act.

The parts following provide regulations for such determinations, including appeal procedures to this Board.

The residence criteria pertaining to village eligibility are contained in § 2651.2(b)(1):

> There must be twenty-five or more Native residents of the village on April 1, 1970, as shown by the census or other evidence satisfactory to the Secretary. A Native properly enrolled to the village shall be deemed a resident of the village.

If this paragraph contained only the first sentence, there would be clearly no question regarding the Board's jurisdiction to review the issue of residence. It is the second sentence which has been asserted as a conclusive presumption in favor of residence as determined by the Enrollment Coordinator. However, this construction renders the word "properly" superfluous in the sentence. Reading the sentence with the word "properly," however, seems to conflict with the phrase "shall be deemed," since a Native "resident" of a village is necessarily "properly enrolled" to the village. Giving effect to both the word "properly" and the phrase "shall be deemed" in the sentence clearly creates a rebuttable presumption that a Native who is enrolled to a village is a resident of that village.

This construction is consistent with other rebuttable presumptions normally used by courts and administrative agencies, such as the presumption that public officials have performed their duty in the proper manner, and the presumption that a person's statements on an official government form are true and accurate to the best of his knowledge and belief.

This rebuttable presumption was adopted by the Board and issued as a ruling in connection with the Board's allocation of the burden of proof in the Pre-Hearing Conference Notice and Order in this matter, dated April 8, 1974:

> b. Persons who appear on the Roll of Alaska Natives as residents of a named village are rebuttably presumed to be residents of the village named for purposes of village eligibility determinations.

The rebuttable presumption is consistent with Section 5(b) of the Act.

Therefore, the Board concludes that it has jurisdiction to review the residence of individuals enrolled as Alaska Natives for purposes of village eligibility determinations. The Board also rules that it does not have jurisdiction to review the determination of the Enrollment Coordinator; that a person meets the requirements for enrollment as an Alaska Native, since such determinations have been vested in the Enrollment Coordinator and the Regional Solicitor by regulations in 25 CFR Part 43h, subject only to the approval of the Secretary, pursuant to 25 CFR 43h.9. The Board takes official notice that persons listed as eligible on the Roll of Alaska Natives approved by the Secretary are "Natives" within the meaning of the Act and regulations.

Definition of Permanent Residence

For determinations of village eligibility, the Board adopts the same definition of residence used by the Enrollment Coordinator, contained in 25 CFR 43h.1(k):

> "Permanent residence" means the place of domicile on April 1, 1970, which is the location of the permanent place of abode intended by the applicant to be his actual home. It is the center of the Native family life of the applicant to which he has the intent to return when absent from that place. A region or village may be the permanent residence of an applicant on April 1, 1970, even though he was not actually living there on that date, if he has continued to intend that place to be his home.

It is helpful to compare this definition of permanent residence with the concept of "home," defined in the Restatement 2d, Conflict of Laws, Section 12, as "the place where a person dwells and which is the center of his domestic, social, and civil life." The comments indicate that when determining whether a place is a person's home, considera-

tion should be given to its physical characteristics, the time one spends there, the things one does there, his intention when absent to return to that place, other dwelling places of the person and similar factors concerning those other dwelling places. Comment C, Section 12, Restatement 2d, Conflict of Laws.

Other factors in the definition in 25 CFR 43h.1(k) recognize the special situation of Alaska Natives, where Native family life may be characterized by patterns of kinship and activities substantially different from non-Native family life. In addition, the definition recognizes the frequently transient life style of Alaska Natives. Thus, the definition emphasizes the factors of Native family life and intent to return.

While intent is obviously subjective and personal, it is frequently capable of objective proof, and where objective evidence is presented which contradicts subjective intent, and the objective evidence is neither rebutted nor explained, it will clearly be persuasive. On the other hand, where economic, educational, or other requirements have temporarily deprived one of any real choice, and both the subjective intent and the objective evidence indicate a genuine connection with the place of enrollment, that place is considered to be the permanent residence of the individual within the meaning of 25 CFR 43h.1(k), notwithstanding that for other purposes a court or an administrative agency may find that person's residence or domicile to be some place other than his "permanent residence" as determined for purposes of the Alaska Native Claims Settlement Act.

The Respondents have cited a letter from Curt Berklund, Deputy Assistant Secretary of the Interior, dated February 27, 1973, to Morris Thompson, Area Director, Bureau of Indian Affairs, Juneau, Alaska, which interprets the definition of "permanent residence" in 25 CFR 43h.1(k). The pertinent paragraph in the letter reads:

> The primary point of confusion is who now living out-of-state enrolls back to Alaska. *Under the above definition a person who has at one time lived in a village or other place in Alaska and considered that place to be his permanent residence on April 1, 1970, and intends to return to that place must enter that place in column 16 on the application form and be enrolled there.* If he considered some place outside of Alaska as his permanent residence on April 1, 1970, and intends to return there, he *must* enter that place in column 16. *There is no "choice" involved. Under no circumstances* may an individual who has never lived in *Alaska enroll to a village in Alaska through personal choice* by entering a village name in column 16 on the application form. The only way in which a person who has never lived in Alaska may be enrolled in Alaska would be by (1) showing an out-of-state permanent residence in column 16 of the application form and (2) voting "No" on the establishment of a 13th regional corporation. He would then be enrolled by the Secretary in one of the twelve regions in Alaska based upon the priorities listed in Section 5(c) of the Act. (emphasis in original)

Considered in the context of the enrollment regulations in 43 CFR 43h, and with particular reference to the problem addressed by this letter,—that is, the enrollment of persons who are residents outside the state of Alaska—the letter is not inconsistent with the interpretation of "permanent residence" adopted by the Board; but neither is it particularly relevant to the problem of how the place of "permanent residence" should be determined. There is no disagreement with the proposition that one should be enrolled to his "permanent residence."

Exceptions

The Board has also been asked to rule on three motions not before the Administrative Law Judge.

1. Respondents have moved that decisions shall be participated in by the full membership of the Board. The Board rules that, since all four members of the Board participated in this decision, the issue is moot.

2. Respondents have moved that they be given an opportunity to submit exceptions to the recommended decision issued by the Board. The fact that respondents were afforded opportunity to submit proposed findings and conclusions to the Administrative Law Judge prior to the issuance of his decision satisfied the requirement that each party prior to final decision shall be afforded reasonable opportunity to submit proposed findings and conclusions or exceptions to the decision or recommended decision of subordinate officers. *Watson Bros. Transportation Co.* v. *United States*, 180 F. Supp 732.

The Board therefore denies such motion.

3. Respondents have moved that they be given an opportunity to submit exceptions to the recommended decision of the Administrative Law Judge. The Board denied such motion for the reasons stated above. Both motions were denied in an Order dated May 28, 1974.

Summary of Evidence

The Administrative Law Judge discussed the evidence presented at the hearing in his decision. (ALJ decision 15-28.) His discussion is substantially duplicated here merely for the sake of continuity in the Board's decision.

> Appellant called a total of ten witnesses. Robert Bruce, the attorney for the Bureau of Indians Affairs, was called merely to identify documents. (Tr. 160-174) Gail Fitzpatrick, a realty specialist employed by the Bureau of Indian Affairs, was called in reference to his work in preparing a field report which had recommended certification of the village of Uyak. Fitzpatrick testified that he had visited Uyak last summer at which

time it was a long established village. (Tr. 22) He stated that there were Native residences, remnants of an old boat dock destroyed by unknown forces, livestock, and, to the best of his knowledge, native bonyas. (Tr 22, 25) He also testified that Uyak was listed in the Alaska Dictionary of Place Names, but he was unable to recall the accompanying population figures. (Tr. 23-24)

Dee Dee Hans testified that she had lived in Uganik Bay, which was about 4 hours by boat from Uyak, since 1959, until she had moved to Kodiak in the last year. (Tr. 26) She testified that she had visited approximately 4 or 5 villages, a total of 12 times, with some stays being overnight. (Tr. 33-34) She stated that from her experience a village consisted of a group of people living in close proximity with a church, post office, stores, etc. (Tr. 28) She declared that she had never met anyone who said they were from Uyak. (Tr. 28) She admitted, however, that she had never been to the site of the village of Uyak. (Tr. 26, 28)

A present and a former pilot testified as to their contact with the village of Uyak. David Henley, a pilot in Kodiak since 1950, stated that he had put down in Uyak a couple of times, had flown over the site a number of times, and had never seen a Native village there. (Tr. 43-46) He admitted that he could not, from personal knowledge, state how many people lived there or the business activity in the area in 1970. (Tr. 48) He also admitted that he was not an expert on the Natives' way of life or how they live. (Tr. 49) Jerry Holt, a former pilot, who was a naval security officer in 1969-70, testified that he had put down in Uyak Bay and had never seen a Native community there. (Tr. 97-98) Though he never set foot at Uyak he did testify that he was within 500 feet of the village, and had never seen people there or skiffs on the beach. (Tr. 98, 103) He compared the native communities of Kar-

luk, Port Lions, Larson Bay, and Akhiok to Uyak stating that in those communities people live there on a year-round basis. (Tr. 106) He admitted that many Natives from those villages spend the winter in Kodiak. (Tr. 99-100) He stated that in his opinion a native village would have someone living there all year long. (Tr. 106) He admitted that he had no personal knowledge as to whether there were or were not 25 people in Uyak in 1970. (Tr. 180)

Darrell Farmen, a taxidermist and guide, testified that he had visited Uyak on two occasions. (Tr. 131) He stated that he could recall no sign of habitation other than buildings presently owned by Leon Francisco. (Tr. 132) He admitted, however, that he had not been to Uyak since 1962. (Tr. 132)

Appellant also presented the testimony of two residents of Uyak Bay. The first, Leon Francisco, maintains a furnished home with his wife and four children, at the site of Uyak village. (Tr. 57-58) Francisco lived across the Bay from Uyak in 1966. (Tr.58) In 1970, he purchased his present residence in Uyak but was not physically in residence until the late spring of 1971. (Tr. 71-72) He had been to the site for 10 days in April of 1970 and had passed by in March of that year. (Tr. 72) He declared that he had never seen a Native village at the site. (Tr. 71) He compared Port Lions with Uyak stating that at Port Lions there are people there with a much larger scale of economic activity. (Tr. 75) He stated that to him residence means residing in a structure on the land a majority of the year. (Tr. 79-80) He did agree that you could live on a boat and it could be a residence, but said that those boats he saw in Uyak harbor stayed about 3 days maximum. (Tr. 81, 85)

Park Munsey, who lives at Uyak Bay about eight to ten miles from the Francisco home, also testified for

the appellant. For the past ten to twelve years he has lived at Uyak Bay for 9 months out of the year. (Tr. 87) He said he was familiar with the Uyak area and that he did not feel as if he was in a village when he was at Uyak. (Tr. 88, 90) While he admitted that he was not an expert on Native culture, it was his opinion, based on visits to other villages, that a village evidenced signs of occupancy on a year round basis, such as a certain amount of activity and the presence of children. (Tr. 91)

The present Manager of the Kodiak National Wildlife Refuge, Gerry Atwell, who has been manager of the refuge since June of 1971, and the former manager of the Kodiak National Wildlife Refuge, Richard Hensel, testified for the appellant. Atwell's testimony was primarily directed to the impact of the exercise of land selection rights within the refuge. (Tr. 118-130) He did identify a number of pictures of the area which show the site in its present condition. (Tr. 115-116)

Hensel testified that he was the refuge manager from February of 1963 to October of 1970. He stated that he had visited between 60-70 Native villages in Alaska, including every Native village on Kodiak island. (Tr. 144) He testified that on April 6, 1970, he flew over the Uyak site. On April 30 of that year he was on a Marine vessel anchored at Uyak, and flew over the site again on May 21 and on August 23. (Tr. 141) On all four occasions, he found it unoccupied, though on the August overflight he saw a series of gill net sites off Seven-Mile Beach, approximately 2-3 miles from Uyak. (Tr. 141) He stated that, on the basis of his experience, it was his view that Uyak was an abandoned village in 1970. (Tr. 144)

The testimonial evidence presented at the hearing can thus be synthesized as follows: (1) a number of people had passing familiarity with the area and with

other Native villages and did not believe that Uyak was a Native village in that it had invariably been unoccupied when they were at the village site; (2) two witnesses, Munsey and Francisco, who have lived at Uyak Bay, Munsey about 8 miles from the site of Uyak village, Francisco at the village site, testified that they had never seen a Native village at the site. (It should be noted that Francisco commenced living at the site in 1971); (3) one witness, Hensel, testified as to extensive contacts with Native villages as well as personal viewings of the village site in 1970.

Findings

The Board makes the following findings, which support the Board's denial of Respondents' motion to dismiss the appeal on the grounds that Appellant had not presented a *prima facie* case.

1. Appellant presented a prima facie case as of April 1, 1970, the village of Uyak did not have an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style.

It was stipulated during the hearing that the physical situs of the village of Uyak was as shown in Bureau of Sport Fisheries and Wildlife Ex. 2. The stipulation left open, however, the question of *occupancy* consistent with the Natives' own cultural patterns and life style. The evidence adduced at the hearing tended to show a historical chain of non-occupancy through 1973. Particularly important was the testimony of Hensel, Munsey and Francisco. Hensel testified that, on the basis of extensive contacts with Native villages, he felt that the village had been abandoned in 1970. Munsey testified that he had lived in the general area of the village for the past ten to twelve years, nine months out of the year, and had never seen what he considers to be a Native village at the Uyak site. Francisco who lived at Uyak from 1971 to the present stated that he

had never seen, with the exception of Joe Darling and his family, Natives occupying the village. While his testimony is not directly related to the critical date, it does properly give rise to an inference of non-occupancy during 1970, since it is unlikely, albeit possible, that occupancy consistent with Native cultural patterns existed in 1970 but abruptly terminated in 1971.

The phrase "consistent with the Native's own cultural patterns and life style" is not self definable. There was much argument in the briefs concerning seasonal use as being consistent with the cultural patterns of the Natives. But the actual testimony presented at the hearing by appellant's witnesses, based on the relatively minor acquaintence with Native village life of many to the rather extensive experience of Hensel with a great number of villages, was that Uyak was not a Native village.

2. The Appellant did not present a prima facie case that thirteen Natives enrolled to Uyak did not use the village site during 1970 as a place where they actually lived for a period of time. To do so is a difficult burden, since neither the required length of the period of time nor the required manner of living at the site are specified by the regulations. It has been argued by Respondents that seasonal visits or use for very short periods are sufficient to meet the regulatory requirement. The Board does not now decide the issue, but notes that there are large time gaps in the evidence relating to observation of the site in 1970. Francisco testified to a visit "sometime" in March and for ten days April, Hensel to overflights on April 6, May 21, and August 23, and an anchorage off Uyak on April 30, and Holt to an overflight on July 4. There was no evidence as to the months of January, February, June, September, October. The evidentiary gaps here are simply too large to permit an inference that thirteen Natives enrolled to Uyak did not use the village site in 1970 as a place where they actually lived for a period of time.

3. The Appellant presented a prima facie case that there were not twenty-five or more Native residents of the village on April 1, 1970. Thirty-one Natives are enrolled to Uyak. None of them testified at the hearing. The printout, obtained from Respondent BIA and admitted as Appellant's Exhibit 8 contains answers on place of residence elicited from Native enrollees to Uyak on the official enrollment forms.

The printout shows that 31 Natives stated that the village of Uyak was their "permanent residence as of April 1, 1970". Under the heading on the forms reading "Your Permanent Residence as of date you complete this form" five of the 31 Natives left the column blank and none of the remaining 26 Natives stated or claimed the village of Uyak. The forms were completed during 1972 or the first part of 1973. Twenty-three of the Natives submitted the forms on June 9, 1972, and stated that Kodiak or the vicinity of Kodiak was their permanent residence on the date the forms were completed. Under the hearing on the forms "Region and Village or City where you resided on April 1, 1970, if you resided there two or more years without substantial interruption," four of the 31 natives left the column blank and none of the remaining 27 stated or claimed the village of Uyak. Eighteen of the 31 Natives placed Kodiak or the vicinity of Kodiak in this column.

Under the heading on the forms "Region and Village or City where you previously resided for an aggregate of 10 years or more," 11 of the 31 Natives left the column blank and none of the remaining 20 Natives stated or claimed the village of Uyak. Seven of the 31 Natives placed Kodiak or the vicinity of Kodiak in this column.

In summary, 31 Natives stated that Uyak was their permanent residence as of April 1, 1970; that a place other than Uyak was their permanent residence as of the date the form was completed in 1972 or 1973; that on April 1, 1970, they resided at a place other than Uyak and had

resided at other place for two or more years without substantial iterruption; and that they previously resided for an aggregate of 10 years or more at a place other than Uyak.

Of the 31 Natives who stated that Uyak was their permanent residence on April 1, 1970, not one indicated even that Uyak was his birthplace or the birthplace of an ancestor. Thus, none of the Natives who claimed, during the enrollment process, that Uyak was their permanent residence on the critical date claimed the slightest ties to it at any other time. An inference of non-use is properly drawn from the printout, in conjunction with the testimony of Appellant's witnesses. This inference is sufficient to raise a substantial doubt that the village of Uyak had 25 Native residents on April 1, 1970, within the meaning of permanent residence as discussed herein. Appellant therefore met his burden of going forward with the evidence.

Decision

Appellant presented a prima facie case on two of the issues raised in this appeal. Respondents did not present a case at the hearing, but chose to rest their case at the close of Appellant's presentation.

Upon consideration of the record in this appeal, the Board finds that (1) there were not 25 or more Native residents of the village of Uyak on April 1, 1970; and (2) the village of Uyak did not have on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and lifestyle.

Therefore it is the decision of the Board that the village of Uyak listed in section 11(b)(1), 43 USC section 1610 (b)(1) of the Act is not eligible to receive land benefits under Sections 14(a) and (b), 43 USC sections 1613(a) and (b) of the Act.

This represents a unanimous decision of the Board.

DATED this 10th day of June, 1974, at Anchorage, Alaska.

/s/ JUDITH M. BRADY
Judith M. Brady, Chairman
Alaska Native Claims Appeal Board

/s/ ALBERT P. ADAMS
Albert P. Adams, Board Member

/s/ ABIGAIL F. DUNNING
Abigail F. Dunning, Board Member

/s/ JOHN A. WALLER
John A. Waller, Board Member

APPROVED: June 14, 1974

/s/ ROGERS C. B. MORTON
Secretary of the Interior

APPENDIX F

UNITED STATES DEPARTMENT OF THE INTERIOR

ALASKA NATIVE CLAIMS APPEAL BOARD
P. O. Box 2433
Anchorage, Alaska 99510

STATE OF ALASKA, ALASKA CONSERVATION SOCIETY, ALASKA PROFESSIONAL HUNTERS ASSN., INC., and FOREST SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, *Appellants*

v.

VILLAGE OF LITNIK, KONIAG, INC., and BUREAU OF INDIAN AFFAIRS, *Respondents*

ANCAB #VE 74-25
ANCAB #VE 74-96
ANCAB #VE 74-101
ANCAB #VE 74-102
ANCAB #VE 74-106

Involving the eligibility of the Village of Litnik for benefits under the Alaska Native Claims Settlement Act of December 18, 1971.

DECISION

Preface

This is a decision on the eligibility of the village of Litnik, Alaska, for status as a Native village under the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. Section 1601-1624 (Supp. II, 1972), hereinafter referred to as the Act, and the Secretary of the Interior's Rules and Regulations on Alaska Native Selections, 43 CFR Part 2650. Status as a village confers certain statutory benefits under the Act, including the right to select substantial quantities of land and receive patent conferring the surface rights associated with it. Subsurface

rights to village lands may be patented to the regional corporation for the region in which the village is located.

In accordance with an Order issued by the Alaska Native Claims Appeal Board on June 28, 1974, an Administrative Law Judge conducted a hearing on August 5, 1974, on the matter of the eligibility of the Village of Litnik.

The parties were afforded an opportunity to file briefs and recommended findings of fact and conclusions of law with the Judge after receipt of the hearing transcript.

On August 30, 1974, the Judge issued a Recommended Decision which sets forth the procedural, legal and factual background of this decision.

Basis for Decision

The record compiled in this proceeding and now before the Board consists of the BIA case file, the Board's file containing the Notice of Appeal, pleadings, briefs, and motions and preliminary rulings thereon by the Board; exhibits submitted by the parties and admitted into evidence at the hearings; the hearing transcript; proposed findings of fact and conclusions of law submitted by the parties; and a recommended decision submitted by the Administrative Law Judge to the Board. It is on this record taken as a whole that the Board reaches its decision.

Issues

The general issue in this case is whether Litnik meets the village eligibility requirements of Section 11(b)(3) of the Act and 43 CFR 2651.2. The specific issues are:

1. Whether the village of Litnik had 25 or more Native residents on April 1, 1970, as shown by the census or other evidence satisfactory to the Secretary?

2. Whether the village of Litnik had on April 1, 1970 an identifiable physical location evidenced by occupancy

consistent with the Natives' own cultural patterns and life styles?

3. Whether at least 13 Natives who are enrolled residents of the village of Litnik used the village during 1970 as a place where they actually lived for a period of time?

4. Whether the village of Litnik is a traditional village which was temporary unoccupied in 1970 because of an Act of God or government authority occurring within the preceding 10 years?

5. Whether the majority of the residents of the village of Litnik are Natives?

Discussion

Respondents have made a motion to dismiss this appeal on the basis that the Natives who are enrolled as residents of the village of Litnik are necessary parties to the determination of the eligibility of the village for benefits under Section 11(b)(3) of the Act. The Administrative Law Judge denied respondents' motion. The Board concurs.

The principle question before the Board on this appeal is whether *the village* qualifies for land selection benefits under the Act. The Board has previously held that the determinations of the Enrollment Coordinator are not appealable to this Board, and therefore the Board does not assume to change or correct the enrollment of individuals as shown on the Roll. *Department of Natural Resources, State of Alaska, et al,* v. *Village of Manley Hot Springs, et al,* ANCAB, VE 74-6, VE 74-15, VE 74-16 (June 10, 1974); *Bureau of Sport Fisheries & Wildlife* v. *Village of Kaguyak, et al,* ANCAB, VE 74-9 (June 10, 1974). As clearly appears from a review of the Act, individual participation in benefits under the Act is dependent upon enrollment as a member of a region, and village. *Bureau of Sport Fisheries & Wildlife, et al,* v. *Village of Pauloff Harbor (Sanak), et al,* ANCAB, VE 74-92, VE

74-93, VE 74-94 (June 9, 1974). Thus, since the Board's decisions do not purport to affect any individual enrolled stockholder in a village corporation in any manner different from the aggregate of all the corporation's stockholders, the participation of each individual stockholder as a party is not considered necessary. It is well established that the individual stockholders are not necessary parties to an action which affects only the rights of the corporate body as a whole. See generally: 19 Am Jur 2d *Corporations* §§ 526, 591-594, and 1454 (1965).

The respondents also charge that the Secretary of the Interior and the Board have lost jurisdiction over these appeals by virtue of the time limitation expressed in Section 11(b)(3) of the Act, 43 U.S.C. § 1610(b)(3).

The Board concurs with and adopts the Solicitor's Opinion, M-36876 (May 29, 1974), which held the June 18, 1974, date for determination of village eligibility to be directory. In addition, Secretarial Order No. 2965 (June 10, 1974) suspended all determinations of village eligibility or ineligiibilty made by the Area Director, Bureau of Indian Affairs, Juneau, Alaska, which have been or are appealed to the Alaska Native Claims Appeal Board for all purposes except as the determinations vest the Board with jurisdiction and the determinations bear on the burden of proof in hearings before the Board in the respective case. Based on the Solicitor's Opinion and the Secretarial Order, the Board concludes that it has jurisdiction in these proceedings.

Regarding the requirement that unlisted villages be "established", which is contained in Section 11(b)(3) of the Act, but is not mentioned in Section 11(b)(2) of the Act, the Board construes the "established village" criteria in *pari materia* with the regulation in 43 CFR § 2651.2 (b)(2) which requires both listed and unlisted villages to have an "identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns

and life style . . .". An unlisted village is not subject to any additional requirements with respect to its "identifiable physical loaction". Both listed and unlisted villages must be "established in the sense that they must meet the requirements of 43 CFR § 2651.2(b)(2).

The respondents invoke the protection of the proviso in 43 CFR § 2651.2(b)(2):

> • • • *Provided,* That no village which is known as a traditional village shall be disqualified if it meets the other criteria specified in this subsection by reason of having been temporarily unoccupied in 1970 because of an act of God or government authority occurring within the preceding 10 years.

The Board's previous decisions hold that the operation of this proviso excuses the requirement of occupancy of the village site during 1970. *Alaska Wildlife Federation & Sportsmen's Council, Inc., et al,* v. *Natives of Afognak, Inc., et al,* ANCAB, VE 74-7, VE 74-8 (June 10, 1974); *Bureau of Sport Fisheries & Wildlife* v. *Village of Kaguyak, et al,* ANCAB, VE 74-9 (June 10, 1974). However, the proviso does not excuse the requirement of an "identifiable location" where such village is, or was, located. 43 CFR § 2651.2(b)(2).

In accordance with the previous discussion, and after review of the entire record in this matter, the Board finds and concludes that the Judge made proper findings of fact and conclusions of law, and hereby adopts and incorporates the Recommended Decision of the Judge set forth in the Appendix hereto. The Board concludes that it is not necessary to reach the issue, whether the majority of the residents are Native, in view of the resolution of the other issues in this appeal, and therefore does not adopt the Judges finding and conclusion on such issue. (ALJ's Recommended Decision, pp. 31 and 37.)

Decision

Pursuant to Section 11(b)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(b)(3) (Supp. II, 1972), the unlisted village of Litnik is hereby certified as *not* eligible for benefits under Section 14(a), 43 U.S.C. § 1613(a)(Supp. II, 1972), of the Act.

This represents a unanimous decision of the Board.

DATED this 25th day of September, 1974, at Anchorage, Alaska.

/s/ JUDITH M. BRADY
Judith M. Brady, Chairman

/s/ ALBERT P. ADAMS
Albert P. Adams, Board Member

/s/ ABIGAIL F. DUNNING
Abigail F. Dunning, Board Member

/s/ JOHN A. WALLER
John A. Waller, Board Member

APPROVED: September 23, 1974

/s/ ROGERS C. B. MORTON
Secretary of the Interior

APPENDIX G

UNITED STATES DEPARTMENT OF THE INTERIOR
ALASKA NATIVE CLAIMS APPEAL BOARD

P. O. Box 2433
Anchorage, Alaska 99510

U.S. FOREST SERVICE, U.S. FISH & WILDLIFE SERVICE, SIERRA CLUB, STATE OF ALASKA, RALPH AND ETHEL BEAMER, and PHIL R. HOLDSWORTH & ALASKA WILDLIFE FEDERATION & SPORTSMEN'S COUNCIL, *Appellants*

v.

ANTON LARSEN, INC., KONIAG, INC., and BUREAU OF INDIAN AFFAIRS, *Respondents*

ANCAB #VE 74-20
ANCAB #VE 74-21
ANCAB #VE 74-36
ANCAB #VE 74-57
ANCAB #VE 74-62
ANCAB #VE 74-112

Involving the eligibility of the Village of Anton Larsen Bay for benefits under the Alaska Native Claims Settlement Act of December 18, 1971.

DECISION

Preface

On August 2, 1974, an Administrative Law Judge conducted a hearing on the appeals of the Bureau of Sport Fisheries and Wildlife (since renamed the U.S. Fish and Wildlife Service); the Forest Service, U.S. Department of Agriculture; State of Alaska; Alaska Chapter of the Sierra Club; Ralph and Ethel Beamer; and Phil R. Holdsworth and the Alaska Wildlife Federation and Sportsmen's Council, Inc., in the matter of the eligibility of the Village of Anton Larsen Bay for benefits under the Alaska Native Claims Settlement Act (the Act), 43 U.S.C. §§ 1601-1624 (Supp. II, 1972).

The parties were afforded an opportunity to file briefs and recommended findings of fact and conclusions of law with the Judge after receipt of the hearing transcript.

On August 30, 1974, the Judge issued a Recommended Decision which adequately sets forth the procedural, legal and factual background of this decision.

Basis for Decision

The record compiled in this proceeding and now before the Board consists of the BIA case file; the Board's files containing Notices of Appeal, pleadings, briefs, and motions and preliminary rulings thereon by the Board; exhibits submitted by the parties and admitted into evidence at the hearing; the hearing transcript; proposed findings of fact and conclusions of law submitted by the parties; and a recommended decision submitted by the Administrative Law Judge to the Board. It is on this record taken as a whole that the Board reaches its decision.

The Board, after reviewing the entire record in this matter, finds that the Judge made the proper rulings on pending motions and adopts and incorporates the rulings contained in the Recommended Decision which is set forth in the Appendix hereto, except to the extent modified below.

Motions

Concerning the consolidated motions of Respondents Koniag, Inc., and Anton Larsen, Inc., to dismiss the appeals of the U.S. Fish and Wildlife Service and the Forest Service on the ground that neither Appellant is a "party aggrieved" within the meaning of the applicable regulations, 43 CFR 2651.2(a)(5) and 43 CFR 4.700, the Board adds the following comments to the discussion on pages 5-10 of the Recommended Decision of the Administrative Law Judge.

This discussion contains an extensive examination of the allegations of injury made by the U.S. Fish and Wildlife Service and the Forest Service at the Bells Flats pre-hearing conference held on July 30, 1974, the Anton Larsen Bay pre-hearing conference held on August 1, 1974, and at the hearing. The arguments put forth by both Appellants and Respondents in support of their positions are also adequately covered by the Judge in his Recommended Decision.

The Board would like to clarify certain points made by the Judge in his discussion of the standing issue. He states that certain cases cited by the Board in its earlier decisions relating to standing and specifically, *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), and *United States* v. *SCRAP*, 412 U.S. 669 (1973), related only to an interpretation of standing under the applicable statute, namely the Administrative Procedure Act, 5 U.S.C. § 702 (1970). It should be pointed out that the holding in each of these two cases relates specifically to the Administrative Procedure Act, but that the issue in dispute in both cases was whether or not the Appellants could be considered a "person . . . adversely affected or aggrieved." 43 U.S.C. § 702 (1970). In order for a party to have standing to appeal a decision of village eligibility to the Board, he must be a "party aggrieved." 43 CFR 2651.2(a)(5); 43 CFR 4.700. The holdings on standing as set forth in *Sierra Club* and *SCRAP* and the reference to same by the Board in its discussion of standing in its previous decision on village eligibility are therefore consistent. *Forest Service, United States Department of Agriculture, et al,* v. *Village of Kasaan, et al,* ANCAB, VE #74-17, VE #74-18 (June 10, 1974); *Bureau of Sport Fisheries and Wildlife* v. *Village of Kaguyak, et al,* ANCAB, VE #74-9 (June 10, 1974).

The Board acts in this proceeding for the Secretary, who has been directed by Congress in 43 U.S.C. § 1610(b)(3) of the Act to determine village eligibility through consideration of census data or other evidence, and to "make findings of fact in each instance."

Part of this statutory fact-finding responsibility has been delegated to the Director, Juneau Area Office of the Bureau

of Indian Affairs in that it is his duty under regulations in 43 CFR 2651.2 to investigate the villages listed in the Act and publish decisions on their eligibility. It is these decisions which are appealed to this Board, and it is the Board's duty to decide, subject to the approval of the Secretary, whether these decisions were correct.

In carrying out this duty, delegated to it by the Secretary, the Board is authorized, in its discretion, to direct hearings. 43 CFR 2651.2(a)(5); 43 CFR 4.704.

It is clearly the purpose of such hearings to enable the Secretary, through the Board, to fulfill his statutory obligation of deciding village eligibility appeals with the fullest possible command of the relevant facts.

This purpose is best served by recognizing standing of a party who demonstrates a nexus with the village sufficient to assure the presentation of factual evidence relevant to the village's eligibility.

The Board will therefore be guided by a relatively broad concept of standing, particularly when the Secretary's fact-finding obligation would be thwarted by a more restrictive approach. *Bureau of Sport Fisheries and Wildlife* v. *Village of Kaguyak, ANCAB* #VE 74-9, at pp. 10-11 (1974).

The Board, after thorough review of the record and the discussion by the Judge of the evidence presented on the issue of standing, does find that the U.S. Fish and Wildlife Service and the Forest Service have standing as "part(ies) aggrieved" within the meaning of 43 CFR 4.700. Therefore, the Judge properly denied Respondents' motion to dismiss the appeals of the Fish and Wildlife Service and the Forest Service for lack of standing to appeal.

Concerning Respondents' motion that the proceeding be dismissed on the ground that the Act, specifically, 43 U.S.C. § 1610(b)(3), required the Secretary to make his determination of eligibility by June 18, 1974, the Board adds the

following comments to those on page 11-13 of the Recommended Decision of the Administrative Law Judge.

The Board concurs with and adopts the Solicitor's Opinion, M-36876 (May 29, 1974), which held the June 18, 1974 date for determination of village eligibility to be directory. In addition, Secretarial Order No. 2965 (June 10, 1974) suspended all determinations of village eligibility or ineligibility made by the Area Director, Bureau of Indian Affairs, Juneau, Alaska, which have been or are appealed to the Alaska Native Claims Appeal Board for all purposes except as the determinations vest the Board with jurisdiction and the determinations bear on the burden of proof in hearings before the Board in the respective case. Based on the Solicitor's Opinion and the Secretarial Order, the Board concludes that it has jurisdiction in these proceedings.

Concerning Respondents' motion that the parties be afforded a reasonable opportunity to file exceptions to the Recommended Decision, the Board adds the following comments to the discussion on page 12 of the Recommended Decision of the Administrative Law Judge.

The fact that Respondents were afforded opportunity to submit proposed findings and conclusions to the Administrative Law Judge prior to the issuance of his decision satisfied the requirement that each party prior to final decision be afforded reasonable opportunity to submit proposed findings and conclusions *or* exceptions to the decision or recommended decision of subordinate officers. *Watson Bros. Transportation Co.* v. *United States,* 180 F. Supp. 732 (D. Neb., 1960).

Concerning Respondents' motion that the issue of 25 Native residents of Anton Larsen Bay is not in issue in this case and Respondents' motion that on questions involving the eligibility of a village, the Natives claiming residence therein are necessary parties to any proceeding, both of which were properly denied by the Administrative Law Judge, the Board makes the following elaboration upon

the Judge's discussion on page 10 of his Recommended Decision.

The Board has previously ruled that it does have jurisdiction to determine the residence of enrolled Natives in connection with a review of the determination of village eligibility. *Bureau of Sport Fisheries and Wildlife* v. *Uyak*, ANCAB #VE 74-11 at pp. 15-21 (1974). Furthermore, the Board has ruled that the Board is not adjudicating individual rights, but rather the rights of the village as an entity. *Bureau of Sport Fisheries and Wildlife* v. *Uyak*, supra, at pp. 15-16. As clearly appears from a review of the Act, individual participation in benefits under the Act is dependent upon enrollment as a member of a region, and village. *Bureau of Sports Fisheries & Wildlife, et al*, v. *Village of Pauloff Harbor (Sanak), et al*, ANCAB, VE #74-92, VE #74-93, VE #74-94 (June 9, 1974). Thus, since the Board's decisions do not purport to affect any individual enrolled stockholder in a village corporation in any manner different from the aggregate of all the corporation's stockholders, the participation of each individual stockholder as a party is not considered necessary. Indeed, the participation of 25 or more enrolled stockholders as parties in these proceedings would only serve to further complicate and confuse these proceedings needlessly. It is well established that the individual stockholders are not necessary parties to an action which affects only the rights of the corporate body as a whole. See generally: 19 Am Jur 2d *Corporations* §§ 526, 591-594, and 1454 (1965). Therefore, these two motions were properly denied by the Administrative Law Judge.

Concerning Respondents' motion challenging the Secretary's regulations, specifically those contained in 43 CFR 2651.2(b)(2), the Board rules that it is bound by the provisions of its own regulations, *McKay* v. *Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955), and the motion was therefore properly denied by the Administrative Law Judge on page 10 of the Recommended Decision.

The Judge has referred to Respondents' argument that the Act should be liberally construed in favor of the Natives, and states that:

> The issue here is not liberal versus strict interpretation. The Native will receive benefits under the Act regardless of the decision as to the eligibility of this village, and there is no evidence such would be less if the village is found ineligible.
>
> —Recommended Decision, p. 13

The Judge's above statement could be misinterpreted to mean that the Native enrolled to Anton Larsen Bay would received land benefits under 43 U.S.C. § 1613(a), regardless of the final decision on its eligibility. In fact, if Anton Larsen Bay is determined ineligible, its members would not receive any land under 43 U.S.C. § 1613(a). Only villages determined to be eligible will receive land pursuant to 43 U.S.C. § 1613(a). Those villages determined eligible will receive proportionate amounts of 22 million acres. While the total acreage will not be changed by the eligibility or ineligibility of any one village, the proportionate share to be distributed to other certified villages will be affected. *Bureau of Sport Fisheries and Wildlife* v. *Village of Kaguyak*, ANCAB #VE 74-9 at pp. 14-15 (1974).

All motions not covered above or in the Recommended Decision, except those specifically granted or granted in effect by this decision, are hereby denied.

Issues

The Board, having reviewed the entire record and the stipulations agreed to by the parties to this appeal, finds that the Judge properly set forth the issues of fact to be resolved in this appeal, subject to the clarifications which follow:

In his discussion of the issues of facts as listed on page 14 of the Recommended Decision, the Judge states that the

regulation relating to "identifiable physical location" contained in 43 CFR 2651.2(b)(2) will be construed in light of the statutory requirement that the 25 or more Natives be residents of an "established village" on the 1970 census enumeration date. 43 U.S.C. § 1610(b)(3)(A).

The Board observes that the criteria contained in 43 CFR 2651.2(b)(2) are a requirement to be met by both listed and unlisted villages. An unlisted village is not subject to any additional requirements with respect to its "identifiable physical location evidenced by . . ." other than those imposed upon listed villages. Both listed and unlisted villages must be "established"in the sense that they must meet the requirements of 43 CFR 2651.2(b)(2).

Findings of Fact

Because the Board has determined the issue of whether or not there were 25 or more Native residents of Anton Larsen Bay on April 1, 1970, to be dispositive of this appeal, the Board does not find it necessary to address the following issues upon which the Judge made findings of fact:

—Whether or not Anton Larsen Bay on April 1, 1970, had an identifiable physical location evidenced by occupancy consistent with Natives' own cultural patterns and life style.

—Whether or not at least 13 Native enrollees used the village during 1970 as a place where they actually lived for a period of time.

—Whether or not a majority of the residents of Anton Larsen Bay are Native.

For the sake of clarifying the Judge's discussion on page 15 of the Recommended Decision of whether or not there were 25 or more Native resident of Anton Larsen Bay on April 1, 1970, the Board feels it would be helpful to include

the following explanation of the enrollment application and the Family List.

The application form referred to is the APPLICATION FOR ENROLLMENT AS AN ALASKA NATIVE, Form 5-3802. On such form there are various requests for information such as current mailing address, name, birthdate, degree of Native blood, and names of parents. Column 16 of the form requests "Your Permanent Residence as of April 1, 1970." Columns 17 through 21 read as follows:

Column 17	Your permanent residence as of date you complete this form.
Column 18	Region and village or city where you resided on April 1, 1970, if you resided there two or more years without substantial interruption.
Column 19	Region and village or city where you previously resided for an aggregate of ten years or more.
Column 20	Region and village or city where you were born, or if outside of Alaska, city and state.
Column 21	Region and village or city from which an ancestor came.

The responses to Columns 16-21 of the Enrollment Form correspond to the responses contained in listings 1-6 of the Family List.

The Board does hereby adopt and incorporate the findings of the Administrative Law Judge on pages 15-17 of his Recommended Decision on the issue of whether or not there were 25 or more Native residents of Anton Larsen Bay on April 1, 1970.

Conclusions of Law

The Board does hereby adopt the conclusion of the Administrative Law Judge on page 22 of his Recommended Decision that the Appellants have presented a *prima facie* case that the decision of the Director, Juneau Area Office, Bureau of Indian Affairs, is incorrect in that there were not 25 or more Native residents of Anton Larsen Bay on April 1, 1970, and further that the Respondents have not shown in rebuttal or by way of an affirmative case that the decision of the Bureau of Indian Affairs is correct in this respect.

Because the findings of fact and conclusions of law relating to the issue of whether or not the Village of Anton Larsen Bay had 25 Native residents on April 1, 1970, as set forth by the Administrative Law Judge and adopted and incorporated by the Board, are dispositive of this appeal, the Board does not find it necessary either to adopt or reject the other findings and conclusions of the Administrative Law Judge on the issues of fact in this appeal.

The Board has considered the proposed findings and conclusions submitted by the parties, and, except to the extent they have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts or because they are not relevant to the rulings that have been made. *United States* v. *Merle I. Zweifel*, 81 I.D. 323 (1974).

Decision

Pursuant to Section 11(b)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(b)(3) (Supp. II, 1972), the unlisted Village of Anton Larsen Bay is hereby certified as *not* eligible for benefits under Section 14(a), 43 U.S.C. § 1613(a) (Supp. II, 1972), of the Act.

APPENDIX H

UNITED STATES DEPARTMENT OF THE INTERIOR
ALASKA NATIVE CLAIMS APPEAL BOARD

P. O. Box 2433
Anchorage, Alaska 99510

ALASKA CONSERVATION SOCIETY, (KODIAK-ALEUTIAN CHAPTER); ALASKA PROFESSIONAL HUNTERS ASSOCIATION; and U.S. FISH AND WILDLIFE SERVICE, *Appellants*

v.

VILLAGE OF UGANIK, KONIAG, INC., and BUREAU OF INDIAN AFFAIRS, *Respondents*

ANCAB #VE 74-99
ANCAB #VE 74-105
ANCAB #VE 74-109

Involving the eligibility of the Village of Uganik for benefits under the Alaska Native Claims Settlement Act of December 18, 1971.

DECISION

Preface

This is a decision on the eligibility of the Village of Uganik, Alaska, for status as a Native village under the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C., Section 1601-1624 (Supp. II, 1972), hereinafter referred to as the Act, and the Secretary of the Interior's Rules and Regulations on Alaska Native Selections, 43 CFR, Part 2650. Status as a village confers certain statutory benefits under the Act, including the right to select substantial quantities of land and receive patent conferring the surface rights associated with the land. Subsurface rights to village lands may be patented to the regional corporation for the region in which the village is located.

The Act in Section 3(c) defines the term "Native village" as "any tribe, band, clan, group, village, community, or association in Alaska listed in sections 11 and 16 of the Act, or which meets the requirements of this Act, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more natives."

Statutory criteria for village eligibility are contained in Section 1610(b)(2), which provides:

> Within two and one-half years from the date of enactment of this Act, the Secretary shall review all of the villages listed in subsection (b)(1) hereof, and a village shall not be eligible for land benefits under subsections 14(a) and (b), and any withdrawal for such village shall expire, if the Secretary determines that—
>
> > (A) less than twenty-five Natives were residents of the village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; or,
> >
> > (B) the village is of a modern and urban character, and the majority of the residents are non-Native.
>
> Any Native group made ineligible by this subsection shall be considered under subsection 14(h).

In addition, Section 11(b)(3) of the Act, 43 U.S.C. Section 1610(b)(3), provides:

> Native villages not listed in subsection (b)(1) hereof shall be eligible for land and benefits under this Act and lands shall be withdrawn pursuant to this section if the Secretary within two and one-half years from the date of enactment of this Act determines that—

This represents a unanimous decision of the Board.

DATED this 3rd day of October, 1974, at Anchorage, Alaska.

/s/ JUDITH M. BRADY
Judith M. Brady, Chairman

/s/ ALBERT P. ADAMS
Albert P. Adams, Board Member

/s/ ABIGAIL F. DUNNING
Abigail F. Dunning, Board Member

/s/ JOHN A. WALLER
John A. Waller, Board Member

APPROVED: October 23, 1974

/s/ ROGERS C. B. MORTON
Secretary of the Interior

(A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and

(B) the village is not of a modern and urban character, and a majority of the residents are Natives.

Implementing regulations in 43 CFR 2651.2(b) provide:

(1) There must be 25 or more Native residents of the village on April 1, 1970, as shown by the census or other evidence satisfactory to the Secretary. A Native properly enrolled to the village shall be deemed a resident of the village.

(2) The village shall have had on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style and at least 13 persons who enrolled thereto must have used the village during 1970 as a place where they actually lived for a period to time: *Provided,* That no village which is known as a traditional village shall be disqualified if it meets the other criteria specified in this subsection by reason of having been temporarily unoccupied in 1970 because of an Act of God or Government authority occurring within the preceding 10 years.

(3) The village must not be modern and urban in character. A village shall be considered to be of modern and urban character if the Secretary determines that it possessed all of the following attributes as of April 1, 1970:

(i) Population over 600.

(ii) A centralized water system and sewage system that serves a majority of the residents.

(iii) Five or more business establishments which provide goods and services such as transient accommodations or eating establishments, specialty retail stores, plumbing and electrical services, etc.

(iv) Organized police and fire protection.

(v) Resident medical and dental services, other than those provided by Indian Health Service.

(vi) Improved streets and sidewalks maintained on a year-round basis.

(4) In the case of unlisted villages, a majority of the residents must be Native, but in the case of villages listed in sections 11 and 16 of the Act, a majority of the residents must be Native only if the determination is made that the village is modern and urban pursuant to subparagraph (3) of this paragraph.

Regulations in 43 CFR 2651.2(a) establish a procedure for determining whether a village meets the above criteria for eligibility. Following application by the village, the determination is made by the Director, Juneau Area Office, Bureau of Indian Affairs, by a process involving publication of a proposed decision, subject to protest by interested parties; consideration of protests; and publication of a final decision on village eligibility which may be appealed to the Secretary. Appeals to the Secretary are made to an ad hoc board which he has personally appointed, at least one member of which must be familiar with Native village life. Appeals to the Board are governed by applicable regulations in 43 CFR 4.700-4.704.

43 CFR 4.704, as amended January 21, 1974 (39 F.R. 2366) provides:

Any hearing on such appeals shall be conducted by the Ad Hoc Appeals Board or a member or members thereof, or by an Administrative Law Judge of the Office of Hearings and Appeals and shall be governed insofar

as practicable by the regulations applicable to other hearings under this part.

The Ad Hoc Appeals Board has subsequently been designated the Alaska Native Claims Appeal Board and will hereinafter be referred to as the Board.

The Village of Uganik is not listed in the Act, and was found eligible on May 21, 1974, by the Director, Juneau Area Office, Bureau of Indian Affairs, in a decision published in the Federal Register on May 31, 1974.

This finding of eligibility reversed a previous determination by the Director, published in the Federal Register on February 22, 1974, that Uganik was ineligible for benefits under the Act. The Director's reconsideration and reversal of his initial determination of ineligibility was based on the enrollment of additional Natives to Uganik subsequent to his initial determination.

The decision of May 21, 1974, was appealed by the Bureau of Sport Fisheries and Wildlife (subsequently renamed the U.S. Fish and Wildlife Service and referred to in this decision as "F&WS") on June 13, 1974; by the Kodiak-Aleutian Chapter of the Alaska Conservation Society (hereinafter referred to as the "Conservation Society") on June 14, 1974; and by the Alaska Professional Hunters Association, Inc. (hereinafter referred to as the "Professional Hunters") on June 14, 1974. The Bureau of Indian Affairs, Uganik Natives, Inc., and the Regional Corporation of Koniag, Inc., responded to the appeal. Following receipt and consideration of motions and issuance of certain preliminary rulings, the Board directed that a *de novo* hearing be conducted on July 25, 1974, in Kodiak, Alaska, by an Administrative Law Judge. The U.S. Fish and Wildlife Service; Uganik Natives, Inc.; Koniag, Inc.; and the Bureau of Indian Affairs appeared by counsel, and were given the opportunity to present oral argument and evidence, to cross-examine opposing witnesses, and to submit proposed findings of fact and conclusions of law after receipt of the hearing transcript. The Conservation Society and the Professional Hunters did not appear and were dismissed as parties. The record compiled in this proceeding and now before the Board consists of the Notices of Appeal, pleadings, briefs, and motions and preliminary rulings thereon by the Board; exhibits submitted by the parties and admitted into evidence at the hearing; the hearing transcript; proposed findings of fact and conclusions of law submitted by the parties; and a recommended decision submitted by the Administrative Law Judge to the Board. It is on this record taken as a whole that the Board reaches its decision.

Issues

The Appellant F&WS contends that the Area Director's decision was in error because (1) the village did not have 25 or more Native residents on April 1, 1970; (2) the village did not have on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and lifestyle, (3) at least 13 persons enrolled thereto did not use the village during 1970 as a place where they actually lived for a period of time, (4) a majority of the residents of the village are not Native, and (5) the BIA lacked jurisdiction on May 31, 1974, to certify the village eligible because appeals from the initial determination of ineligibility were then pending before the Board and had not been remanded to the BIA.

Stipulation

It was stipulated that the provisions in 43 CFR 2651.2(b)(2) referring to an Act of God causing temporary unoccupancy were not involved in the case. (Tr. p. 3-18).

Rulings on Motions

The Board concurs with and adopts the Administrative Law Judge's rulings on motions brought forward at the

prehearing conference and hearing, as modified by the following clarification and discussion.

Residence

Insofar as an issue presented for decision in this appeal is whether or not the village of Uganik had 25 Native residents on April 1, 1970, and Respondent has moved to exclude consideration of the question of residence of enrolled persons, it is appropriate to discuss the Board's jurisdiction to consider evidence on residence, and the Board's definition of residence within the contemplation of the Act and implementing regulations.

Board's Jurisdiction to Review Residence

The Board reaffirms its previous rulings on its jurisdiction to review the residence of enrolled Natives in *Department of Natural Resources, State of Alaska et al,* v. *Village of Manley Hot Springs, et al,* ANCAB #VE 74-6, VE 74-15, VE 74-16 (June 10, 1974) at pp. 14-19:

> As to the assertion that certain issues relating to enrollment are outside the Board's jurisdiction:
>
> (a) Enrollment for purposes of determining the status and eligibility of the individuals as Alaska Natives is outside the jurisdiction of the Board, and the Board will not hear appeals from Decisions of the Enrollment Coordinator.
>
> (b) The Enrollment Coordinator is not a necessary party before the Board because the only administrative determination properly appealed and within the Board's jurisdiction on this appeal is the Final Decision of the Area Director on the eligibility of the village.
>
> (c) The regulations in 43 CFR § 2651.2(b)(1) provide for an investigation and examination by the Area

> Director of "available records and evidence that may have a bearing on the character of the village and its eligibility."
>
> (d) The regulations in 43 CFR § 2651.2(b)(1) direct the Area Director to consider the residence of Natives "properly" enrolled to the village as shown on the roll, but also direct the Area Director to consider the census and other evidence.
>
> (e) Since the regulations thus recognize that the determinations of village eligibility and enrollment are separate decisions, made by separate officers, under separate procedures, this Board has jurisdiction to review the final decision of the Area Director on the eligibility of the village . . . but is not required to review the enrollment of the individuals as determined by the Enrollment Coordinator.
>
> Therefore, in deciding appeals from the Area Director's decisions on village eligibility, where the question of whether a village has the requisite minimum of 25 Native residents, as set forth in 43 CFR § 2651.2 (b)(1), is in issue, the Board will consider evidence on such questions including, but not limited to, evidence of residence as shown on the roll.—Order Denying Motions to Dismiss, dated March 25, 1974.
>
> This order constitutes a ruling by the Board that it does have jurisdiction to determine the residence of enrolled Natives in connection with the determination of village eligibility.—*Manley Hot Springs,* supra, pp. 14-15 (1974)

Basis of Jurisdiction on Residence

This decision is based on construction of the Act and applicable regulations.

Section 5(a):

> The Secretary shall prepare within two years from the date of enactment of this Act a roll of all Natives who were born on or before, and who are living on, the date of the enactment of this Act. *Any decision of the Secretary regarding eligibility for enrollment* shall be final. (Emphasis added)

The finality of the Secretary's decision goes to eligibility, i.e., determination of sufficient blood quantum for individual placement on the Roll.

Section 5(b):

> The roll prepared by the Secretary *shall show* for each Native, among other things, the region and the village or other place in which he resided on the date of the 1970 census enumeration, and he shall be enrolled according to such residence. (Emphasis added)

There is no inference of finality of decision insofar as the residence of individuals on the roll is concerned, according to the language in the Act. However, the language "shall show" establishes a strong presumption of the correctness of the residency shown on the Roll. To interpret otherwise would lead to the conclusion that the Roll, insofar as it presumes to establish residence, is a futile endeavor.

Finally, the Roll signed by the Bureau of Indian Affairs Enrollment Coordinator and approved by the Secretary on December 17, 1973, certifies only that persons listed on the Roll were determined to be eligible for enrollment as Alaska Natives.

> Upon completion, the Coordinator shall affix to the Roll a certificate indicating that to the best of his knowledge and belief the Roll contains only the names of persons who were determined to meet the requirements for enrollment as Alaska Natives. The Roll shall

> be submitted to the Secretary for approval. (25 CFR 43h.9)

The differing language of the statute regarding eligibility and residency on the roll reflects a unique Indian enrollment required by the Alaska Native Claims Settlement Act. Since the settlement involves both land and money entitlements, and since these settlement entitlements accrue, in most part, (exceptions in § 14(h)) to regional and village corporations and enrollee-stockholders of these corporations, the roll had first to establish who was eligible to participate in the benefits of the settlement—i.e., who was an Alaskan Native. Second, the roll had to provide the basis for determining the kinds of benefits an individual would receive—i.e., whether as a stockholder of a village corporation and/or, a stockholder of a regional corporation. Third, the roll had to provide, on the basis of an individual's claimed residence, information as to the proportional amount of land and money entitlements the village and regional corporations will receive insofar as these are based on population.

Certification of the roll with a final determination as to eligibility of Natives and a showing of residency to determine individual benefits and assignment of proportional money and land entitlements to the village and regional corporations occur, under the timetable in the Act, prior to a determination of village eligibility.

Determination of village eligibility, under the Act and regulations, occurs after completion of the roll, but nevertheless requires a second round of fact finding.

Section 3(c):

> "Native village" means any tribe, band, clan, group, village, community, or association in Alaska listed in Sections 11 and 16 of this Act, or which meets the requirements of this Act, and *which the Secretary determines* was on the 1970 census enumeration date (as

shown by the census or other evidence satisfactory to the Secretary, *who shall make findings of fact in each instance*), composed of twenty-five or more Natives. . . . (Emphasis added)

The determination by the Secretary as to what qualifies as a Native village must be based on findings of fact, according to the language of the statute.

Section 11(b)(2):

Within two and one-half years from the date of enactment of this Act, the Secretary *shall review* all of the villages listed in subsection (b)(1) hereof, and a village shall not be eligible for land benefits under subsections 14(a) and (b), and any withdrawal for such villages shall expire *if the Secretary determines that*—

(A) less than twenty-five Natives were residents of the village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; or,

(B) the village is of a modern and urban character and the majority of the residents are non-Native. (Emphasis added)

Section 11(b)(3):

Native villages not listed in subsection (b)(1) hereof shall be eligible for land and benefits under this Act and lands shall be withdrawn pursuant to this section *if the Secretary* within two and one-half years from the date of enactment of this Act, *determines* that—

(A) twenty-five or more Natives were residents of any established village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and

(B) the village is not of a modern and urban character, and a majority of the residents are Natives. (emphasis added)

The statutory language mandates a Secretarial review and fact-finding before final determination of the eligibility of a village, and the mandate is inclusive as to the requirements for eligibility—25 residents of a village on April 1, 1970, and that the village not be of a modern and urban character.

Again, under the timetables in the Act, decisions as to eligibility and a showing of residency occur first: "The Secretary shall prepare *within two years* from the date of enactment of this Act, a roll. . . ." § 5(a) (emphasis added). "*Within two and one-half years* from the date of enactment of this Act, the Secretary shall review all of the villages. . ." § 11(b)(2) and (3). (Emphasis added)

Instead, Congress mandated that the Secretary, with the roll completed and information on it available to him, make a review and finding of fact on every village to determine whether it was, on the April 1, 1970 census date, composed of 25 Native residents and was not modern and urban in character.

Because the compilation and certification of the roll precedes in time the determinations of village eligibility, Congress had the opportunity to require that residency as indicated on the roll was to be conclusive for the purposes of determining village eligibility. The fact that Congress did not so provide indicated that Congress did not intend for the residency as indicated on the role to be conclusive for such purposes.

If the residence as shown on the roll is, as Respondents argue, conclusive on the issue of the residence of enrolled Natives, there would be no need to make a review and findings of fact in the determination of 25 residents.

Interior Department regulations affecting Native land selection reflect compliance with the Congressional fact-finding and review mandate in 43 CFR Part 2650.

§ 2651.2(a):

> Pursuant to Sections 11(b) and 16(a) of the Act, the Director, Juneau Area Office, Bureau of Indian Affairs, shall review and make a determination not later than December 19, 1973, as to which villages are eligible for benefits under the Act.

The parts following provide regulations for such determinations, including appeal procedures to this Board.

The residence criteria pertaining to village eligibility are contained in § 2651.2(b)(1):

> There must be twenty-five or more Native residents of the village on April 1, 1970, as shown by the census or other evidence satisfactory to the Secretary. A Native properly enrolled to the village shall be deemed a resident of the village.

If this paragraph contained only the first sentence, there would be clearly no question regarding the Board's jurisdiction to review the issue of residence. It is the second sentence which has been asserted as a conclusive presumption in favor of residence as determined by the Enrollment Coordinator. However, this construction renders the word "properly" superfluous in the sentence. Reading the sentence with the word "properly," however, seems to conflict with the phrase "shall be deemed," since a Native "resident" of a village is necessarily "properly enrolled" to the village. Giving effect to both the word "properly" and the phrase "shall be deemed" in the sentence clearly creates a rebuttable presumption that a Native who is enrolled to a village is a resident of that village.

This construction is consistent with other rebuttable presumptions normally used by courts and administrative agencies, such as the presumption that public officials have performed their duty in the proper manner, and the presumption that a person's statements on an official government form are true and accurate to the best of his knowledge and belief.

This rebuttable presumption was adopted by the Board for all village eligibility appeals concerning villages listed in Section 11(b)(1) of the Act. *Department of Natural Resources, State of Alaska, et al,* v. *Village of Manley Hot Springs, et al,* ANCAB, VE 74-6, VE 74-15, VE 74-16 (June 10, 1974).

> b. Persons who appear on the Roll of Alaska Natives as residents of a named village are rebuttably presumed to be residents of the village named for purposes of village eligibility determination.—*Manley Hot Springs,* supra, at page 19 (1974).

The rebuttable presumption is consistent with Section 5(b) of the Act.

Therefore, the Board concludes that it has jurisdiction to review the residence of individuals enrolled as Alaska Natives for purpose of village eligibility determinations. The Board also rules that it does not have jurisdiction to review the determination of the Enrollment Coordinator, that a person meets the requirements for enrollment as an Alaska Native, since such determinations have been vested in the Enrollment Coordinator and the Regional Solicitor by regulations in 25 CFR Part 43h, subject only to the approval of the Secretary, pursuant to 25 CFR 43h.9. The Board takes official notice that persons listed as eligible on the Roll of Alaska Natives approved by the Secretary are "Natives" within the meaning of the Act and regulations.

Definition of Permanent Residence

For determinations of village eligibility, the Board adopts the same definition of residence used by the Enrollment Coordinator, contained in 25 CFR 43h.1(k):

> "Permanent residence" means the place of domicile on April 1, 1970, which is the location of the permanent place of abode intended by the applicant to be his actual home. It is the center of the Native family life of the applicant to which he has the intent to return when absent from that place. A region or village may be the permanent residence of an applicant on April 1, 1970, even though he was not actually living there on that date, if he has continued to intend that place to be his home.

It is helpful to compare this definition of permanent residence with the concept of "home," defined in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 12, (1971) as "the place where a person dwells and which is the center of his domestic, social, and civil life." The comments indicated that when determining whether a place is a person's home, consideration should be given to its physical characteristics, the time one spends there, the things one does there, his intention when absent to return to that place, other dwelling places of the person and similar factors concerning those other dwelling places. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 12, Comment C at 50 (1971).

Other factors in the definition in 25 CFR 43h.1(k) recognize the special situation of Alaska Natives, where Native family life may be characterized by patterns of kinship and acivities substantially different from non-Native family life. In addition, the definition recognizes the frequently transient life style of Alaska Natives. Thus ,the definition emphasizes the factors of Native family life and intent to return.

While intent is obviously subjective and personal, it is frequently capable of objective proof, and where objective evidence is presented which contradicts subjective intent, and the objective evidence is neither rebutted nor explained, it will clearly be persuasive. On the other hand, where economic, educational, or other requirements have temporarily deprived one of any real choice, and both the subjective intent and the objective evidence indicate a genuine connection with the place of enrollment, that place is considered to be the permanent residence of the individual within the meaning of 25 CFR 43h.1(k), notwithstanding that for other purposes a court or an administrative agency may find that person's residence or domicile to be some place other than his "permanent residence" as determined for purposes of the Alaska Native Claims Settlement Act.

A letter from Curt Berklund, Deputy Assistant Secretary of the Interior, dated February 27, 1973, to Morris Thompson, Area Director, Bureau of Indian Affairs, Juneau, Alaska, which interprets the definition of "permanent residence" in 25 CFR 43h.1(k), has figured prominently in several village eligibility appeals. The pertinent paragraph in the letter reads:

> The primary point of confusion is who now living out-of-state enrolls back to Alaska. *Under the above definition a person who has at one time lived in a village or other place in Alaska and considered that place to be his permanent residence on April 1, 1970, and intends to return to that place must enter that place in column 16 on the application form and be enrolled there.* If he considered some place outside of Alaska as his permanent residence on April 1, 1970, and intends to return there, he *must* enter that place in column 16. *There is no "choice" involved. Under no circumstances* may an individual who has never lived in *Alaska enroll to a village in Alaska through personal choice* by entering a village name in column 16 on the

application form. The only way in which a person who has never lived in Alaska may be enrolled in Alaska would be by (1) showing an out-of-state permanent residence in column 16 of the application form and (2) voting "No" on the establishment of a 13th regional corporation. He would then be enrolled by the Secretary in one of the twelve regions in Alaska based upon the priorities listed in Section 5(c) of the Act. (emphasis in original)

Considered in the context of the enrollment regulations in 25 CFR 43h, and with particular reference to the problem addressed by this letter—that is, the enrollment of persons who are residents outside the state of Alaska—the letter is not inconsistent with the interpretation of "permanent residence" adopted by the Board; but neither is it particularly relevant to the problem of how the place of "permanent residence" should be determined. There is no disagreement with the proposition that one should be enrolled to his "permanent residence."

Standing

Appellant's standing is challenged on the grounds that they cannot be a "party aggrieved" within the meaning of 43 CFR 4.700 because, as a Government agency, they are not eligible for status as a party and because they have failed to assert a real injury.

Neither the Act nor its legislative history can be construed as affirmatively prohibiting the recognition in the proper circumstances of an agency as an aggrieved party. The fact that Congress made no express provision for the formal participation of the Appellant in the determination of village eligibility cannot be read as a constructive denial of standing.

Except for Section 2(b) of the Act which states, "the settlement should be accomplished rapidly • • • with maximum participation by Natives in decisions affecting their rights and property • • • •," the Act does not expressly contemplate participation by parties other than the Secretary in the determination of village eligibility. A logical result of Respondents' argument would be that no one could appeal a decision certifying a village as eligible since Congress had not specifically provided. The Board rejects this argument.

Furthermore, a public official or his agency has authority to challenge action taken by another federal agency when the action of the other agency is disturbing the congressional policy administered by him. *U.S. ex rel. Chapman* v. *Federal Power Commission,* 345 U.S. 153 (1953).

Respondents' contention, that Appellant lacks standing as an aggrieved party because of a failure to assert sufficient injury, must be examined carefully. It is helpful to review the rationale and development of the concept of standing.

The requirement of standing dictates that each party to litigation should have some interest therein, and operates to protect both individual parties and the judicial process. This requirement recognizes that it is intrinsically unfair to expose an individual party to the trouble and expense of a frivolous suit, instigated by an opposing party who has suffered no real harm from the actions of the defendant. It also recognizes the reliance of the court, in the adversary system, on the ability of the parties before it to present relevant evidence. The issue of standing focuses on the party seeking to get his complaint before the court, to ascertain that he has such a personal stake in the outcome as to assure the "concrete adverseness" which sharpens the presentation of issues on which the court depends. *Flast* v. *Cohen,* 392 U.S. 320 (1968); *Baker* v. *Carr,* 369 U.S. 186 (1962).

Pursuing this concept, the courts have developed a dual test of standing; to have standing, a party must allege injury, in fact, to an interest within a zone of interest protected by the statute or constitutional guarantee invoked. *Association of Data Processing Service Organizations* v. *Camp,* 397 U.S. 150 (1970); *Barlow* v. *Collins,* 397 U.S. 159 (1970). Not only must the injury alleged be a cognizable interest, but the party alleging it must himself be among the injured. *Sierra Club* v. *Morton,* 405 U.S. 727 (1972). The injury must be real, not remote or speculative; a plaintiff must allege "that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." *U.S.* v. *SCRAP,* 412 U.S. 669, 688-9 (1973).

It is recognized, as argued by the Respondents, that courts have applied these tests to determine the standing of litigants before them. However, it must also be remembered that the Board is an administrative body, not a court.

The Board acts in this proceeding for the Secretary, who has been directed by Congress in Section 11(b)(3) of the Act to determine village eligibility through consideration of census data or other evidence, and to "make findings of fact in each instance."

Part of this statutory fact-finding responsibility has been delegated to the Director, Juneau Area Office of the Bureau of Indian Affairs in that it is his duty under regulations in 43 CFR 2651.2 to investigate the villages listed in the Act and publish decisions on their eligibility. It is these decisions which are appealed to this Board, and it is the Board's duty to decide, subject to the approval of the Secretary, whether these decisions were correct.

In carrying out this duty, delegated to it by the Secretary, the Board is authorized, in its discretion, to direct hearings. (43 CFR 2651.2(a)(5); 43 CFR 4.704)

It is clearly the purpose of such hearings to enable the Secretary, through the Board, to fulfill his statutory obligation of deciding village eligibility appeals with the fullest possible command of the relevant facts.

This purpose is best served by recognizing standing of a party who demonstrates a nexus with the village sufficient to assure the presentation of factual evidence relevant to the village's eligibility.

The Board will therefore be guided by a relatively broad concept of standing, particularly when the Secretary's fact-finding obligation would be thwarted by a more restrictive approach.

This is consistent with the approach followed in other proceedings before the Department of the Interior. In *Navajo Tribe of Indians* v. *Utah,* 12 IBLA 5, 80 I.D. 441 (1973), the Tribe was accorded standing to challenge issuance of a confirmatory patent to Utah, based on prior occupancy of the patented lands by individual Navajos—although such occupancy, if proven, would have defeated the Tribe's claim to, and interest in, the lands. In *Crooks Creek Commun,* 10 IBLA 243 (1973), the Interior Board of Land Appeals recognized standing of a commune consisting of some ten people to appeal the proposed logging of lands adjacent to their property, despite the fact that the Commune asserted no legal interest in such lands and despite uncertainty as to the group's legal status as an entity.

It must also be remembered that the "injury in fact" test imposed by the courts is itself a liberal standard. Denial of standing to the Sierra Club in *Sierra Club* v. *Morton,* 405 U.S. 727 (1972), was based on the Club's failure even to allege that it or its members would be affected by the action complained of, rather than on the type of harm alleged. And in *U.S.* v. *SCRAP,* 412 U.S. 669 (1973), the court deemed plaintiffs to have alleged perceptible harm based on allegations that their use of natural resources in

Washington, D.C. area would be disturbed by the adverse environmental effects of nonuse of recyclable goods, which plaintiffs asserted would result from a railroad freight surcharge on such goods.

As to the standing of the Fish and Wildlife Service, Respondents concede in their Post-Hearing Brief that Uganik must, by reason of its location, select substantially all of its 69,120 acre entitlement from within the 1,820,000 acre Kodiak National Wildlife Refuge. (Respondents' Post-Hearing Brief, p. 19)

The Board considers it proper to note that Appellant's interest in the present appeal derives from its management responsibility for the Kodiak National Wildlife Refuge as a whole, and must be considered in that context. To draw a quantitative comparison between the land entitlement of a village or villages and the total acreage of the Refuge is not relevant to Appellant's interest in the matter. The Board has held, in prior decisions cited by the Judge on page 4 of his Recommended Decision, that the Fish and Wildlife Service has standing to challenge the eligibility of a village with potential land selection rights in a national wildlife refuge.

Respondents argue vigorously that injury to the Refuge inherent in the loss of such a substantial quantity of land is ameliorated by other provisions in the Act. They point out that under Section 22(e), the Secretary may add to the Refuge other public lands in Alaska, to replace those selected by a village; and that under Section 22(g), the United States reserves a right of first refusal if village lands within the Refuge are ever sold, and such lands remain subject in any event to the laws and regulations governing the use and development of the Refuge. (Respondents' Post-Hearing Brief, pp. 19-22)

However, the Board is not persuaded that these provisions operate to deprive Appellant Fish and Wildlife Serviec of standing in this appeal. In allowing village selections within wildlife refuges, Congress clearly chose between competing policies. In limiting village rights in such lands, Congress clearly recognized and sought to mitigate the potential for adverse effects on the Refuge caused by its choice. It would be an unwarranted assumption, however, to conclude that these provisions completely ameliorated the potential for injury.

Albeit subject to the encumbrances imposed by Section 22(g), conveyance to a village of lands within a Refuge effects a change in the ownership of those lands, which pass from public ownership and control to at least a partial private ownership. It would be unreasonable to conclude that such a transfer would not dilute the management control which the Fish and Wildlife Service now exercises over lands within the Refuge. The uncertainties inherent in such a dilution of control (treatment of trespass, funding constraints on exercise of first refusal rights by the government in the event of future sale, dual management purposes) cannot be dismissed lightly.

It further appears to the Board that Respondent's reliance on the mitigating provisions in the Act, to negate Appellant's injury, may be misplaced. These provisions have little, if any, relevance to the injury complained of; i.e., that refuge lands would pass into the ownership of a village not eligible under the Act to receive them. The operation of statutory safeguards when refuge lands pass to a qualified village should not foreclose Appellant from challenging the certification of a village which it believes to be ineligible.

For these reasons, the Board concludes that Appellant has a nexus with the village sufficient to assure the presentation of factual evidence relevant to the village's eligibility, and therefore has standing to appeal.

Other Motions

Concerning Respondents' motion that the proceeding be dismissed on the ground that Section 11(b)(3) of the Act, 43 U.S.C. § 1610(b)(3), required the Secretary to make his determination of eligibility by June 18, 1974, the Board adds the following comments to those on pages 5-6 of the Recommended Decision of the Administrative Law Judge.

The Board concurs with and adopts the Solicitor's Opinion, M-36876 (May 29, 1974), which held the June 18, 1974, date for determination of village eligibility to be directory. In addition, Secretarial Order No. 2965 (June 10, 1974) suspended all determinations of village eligibility or ineligibility made by the Area Director, Bureau of Indian Affairs, Juneau, Alaska, which have been or are appealed to the Alaska Native Claims Appeal Board for all purposes except as the determinations vest the Board with jurisdiction and the determinations bear on the burden of proof in hearings before the Board in the respective case. Based on the Solicitor's Opinion and the Secretarial Order, the Board concludes that it has jurisdiction in these proceedings.

Concerning Respondents' motion that the parties be afforded a reasonable opportunity to file exceptions to the recommended decision, the Board adds the following comments to the discussion on page 6 of the Recommended Decision of the Administrative Law Judge.

The fact that Respondents were afforded opportunity to submit proposed findings and conclusions to the Administrative Law Judge prior to the issuance of his decision satisfied the requirement that each party prior to final decision be afforded reasonable opportunity to submit proposed findings and conclusions or exceptions to the decision or recommended decision of subordinate officers. *Watson Bros. Transportation Co.* v. *United States,* 180 F. Supp. 732 (D. Neb. 1960).

Twenty-Five Native Residents on April 1, 1970

The Administrative Law Judge found that the Village of Uganik, comprising the area depicted between the initials "N.S.", marked on F&WS Ex. No. 3 as discussed above, did not have 25 Native residents. The Board concurs in and adopts this finding, for the reasons stated by the Judge. (ALJ Recommended Decision pp. 26-29).

The Board also observes that even if the identifiable physical location of the village were deemed to extend around the entire periphery of Uganik Bay, (See F&WS Exs. No. 2 and 3) such as an extended village site would still not have 25 Native residents. Evidence in the record which supports the Administrative Law Judge's finding that Richard Simeonoff was not a resident of the Village of Uganik as described above (ALJ Recommended Decision pp. 23, 28, 29) also supports the conclusion that he was not resident anywhere in the Uganik Bay area on April 1, 1970. The record supports the same conclusion with respect to Richard Simeonoff, Sr.'s minor children, Tollak John Simeonoff, Richard Ethan Simeonoff, Jr., Gilberg (sic) Roland Simeonoff, Kelly Simeonoff, and Alyce Maureen Simeonoff. Such minor children would in any event, absent evidence of emancipation, be presumed to have the same residence for purposes of determining village eligibility, as their enrolled parent. In addition, the Board notes that Frederick Michael Simeonoff, son of Peter Edwin Simeonoff, was not born until April 23, 1971; and therefore cannot be counted, for purposes of determining village eligibility, as a resident of any village on April 1, 1970. *Forest Service* v. *Kasaan,* ANCAB #VE 74-17 at 21 (1974). 25 CFR 43h.1 (k) defines "permanent residence" in part as "place of domicile." The legal concept of domicile attaches only at birth, and the infant's domicile is, by operation of law, that of the parents on whom he or she is dependent. 25 Am. Jur. 2d *Domicil* §§ 4, 12, 15, 63 (1966).

BIA Ex. No. 2, the official Roll for the Village of Uganik, shows a total enrollment of 29 Natives. Based on the conclusion that the seven enrollees discussed above cannot be counted as residents for the purpose of determining village eligibility, it follows that the Uganik Bay area had less than the requisite 25 Native permanent residents, on April 1, 1970.

Decision

The Administrative Law Judge, in his Recommended Decision, summarized and analyzed the evidence relevant to each issue raised by this appeal. (ALJ Recommended Decision, pp. 11-29); and stated his findings of fact and conclusions of law on each issue. (ALJ Recommended Decision, p. 30). The Board, having reviewed the entire record in this appeal, concurs in the Judge's summary and analysis of the evidence and finds that the Judge made proper findings of fact and conclusions of law; the Board therefore adopts and incorporates in its Decision the Recommended Decision of the Administrative Law Judge set forth as Appendix I, as modified herein.

The proposed findings of fact and conclusions of law submitted by the parties have been considered and, except to the extent they have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts or because they are not relevant to the rulings that have been made. *United States* v. *Merle I. Zweifel,* 80 I.D. 323 (1973).

Except to the extent that this decision reflects a favorable disposition, all pending motions are denied.

Pursuant to Section 11(b)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(b)(3) (Supp. II, 1972), the unlisted village of Uganik is hereby certified as *not* eligible for benefits under Section 14(a) 43 U.S.C. § 1613 (a) (Supp. II, 1972) of the Act.

This represents a unanimous decision of the Board.

DATED this 21st day of October, 1974, at Anchorage, Alaska.

Alaska Native Claims Appeal Board

/s/ JUDITH M. BRADY
Judith M. Brady, Chairman

/s/ ALBERT P. ADAMS
Albert P. Adams, Board Member

/s/ ABIGAIL F. DUNNING
Abigail F. Dunning, Board Member

/s/ JOHN A. WALLER
John A. Waller, Board Member

APPROVED: November 1, 1974

/s/ ROGERS C. B. MORTON
Secretary of the Interior

APPENDIX I

UNITED STATES DEPARTMENT OF THE INTERIOR
ALASKA NATIVE CLAIMS APPEAL BOARD

P. O. Box 2433
Anchorage, Alaska 99510

U.S. FISH & WILDLIFE SERVICE, STATE OF ALASKA, SIERRA CLUB, RALPH & ETHEL BEAMER, and PHIL HOLDSWORTH & ALASKA WILDLIFE FEDERATION & SPORTSMEN'S COUNCIL, *Appellants*

v.

VILLAGE OF BELLS FLATS, KONIAG INC., and BUREAU OF INDIAN AFFAIRS, *Respondents*

ANCAB #VE 74-22
ANCAB #VE 74-56
ANCAB #VE 74-37
ANCAB #VE 74-111
ANCAB #VE 74-66

Involving the eligibility of the Village of Bells Flats for benefits under the Alaska Native Claims Settlement Act of December 18, 1971.

DECISION

Preface

On July 31 and August 1, 1974, an Administrative Law Judge conducted a hearing on the appeals of the Bureau of Sport Fisheries and Wildlife (since renamed the U.S. Fish and Wildlife Service), State of Alaska, Alaska Chapter of the Sierra Club, Ralph and Ethel Beamer, Phil R. Holdsworth and Alaska Wildlife Federation and Sportsmen's Council, Inc., in the matter of the eligibility of the village of Bells Flats for benefits under the Alaska Native Claims Settlement Act (the Act), 43 U.S.C. §§ 1601-1624, (Supp. II, 1972).

The parties were afforded an opportunity to file briefs and recommended findings of fact and conclusions of law with the Judge after receipt of the hearing transcript.

On August 30, 1974, the Judge issued a Recommended Decision which adequately sets forth the procedural, legal and factual background of this decision.

Basis for Decision

The record compiled in this proceeding and now before the Board consists of the BIA case file; the Board's file containing the Notice of Appeal, pleadings, briefs, and motions and preliminary rulings thereon by the Board; exhibits submitted by the parties and admitted into evidence at the hearing; the hearing transcript; proposed findings of fact and conclusions of law submitted by the parties; and a recommended decision submitted by the Administrative Law Judge to the Board. It is on this record taken as a whole that the Board reaches its decision.

The Board, after reviewing the entire record in this matter, finds that the Judge made proper rulings on pending motions and proper findings of fact and conclusions of law except to the extent modified herein, and adopts and incorporates the Recommended Decision of the Judge, set forth in the Appendix hereto, as modified herein.

Clarification and Additional Discussion
Motions

Concerning the consolidated motions of respondents Koniag, Inc., and Bells Flats Natives, Inc., to dismiss the appeal of the U.S. Fish and Wildlife Service on the ground that the appellant is not a "party aggrieved" within the meaning of the applicable regulations, 43 CFR 2651.2(a)(5) and 43 CFR 4.700, and lacks standing to appeal the eligibility of the village of Bells Flats, the Board adds the following comments to the discussion on pages 5-10 of the Recommended Decision of the Administrative Law Judge.

This discussion contains an extensive examination of the allegations of injury made by the U.S. Fish and Wildlife Service at the pre-hearing conference held on July 30, 1974, and at the hearing. The arguments put forth by both appellants and respondents in support of their positions are also adequately covered by the Judge in his Recommended Decision.

The Board would like to clarify certain points made by the Judge in his discussion of the standing issue. He states that certain cases cited by the Board in its earlier decisions relating to standing and specifically, *Sierra Club* v. *Morton*, 405 U.S. 727 (1973), and *United States* v. *SCRAP*, 422 U.S. 669 (1972), related only to an interpretation of standing under the applicable statute, namely the Administrative Procedure Act, 5 U.S.C. § 702 (1970). It should be pointed out that the holding in these two cases does relate specifically to the Administrative Procedure Act, but that the issue in dispute in both cases was whether or not the appellants could be considered a "person . . . adversely affected or aggrieved." 43 U.S.C. § 702 (1970). In order for a party to have standing to appeal a decision of village eligibility to the Board, he must be a "party aggrieved." 43 CFR 2651.2(a)(5); 43 CFR 4.700. The holdings on standing as set forth in *Sierra Club* and *SCRAP* and the reference to same by the Board in its discussion of standing in its previous decisions on village eligibility are therefore consistent.

The Board acts in this proceeding for the Secretary, who has been directed by Congress in Section 11(b)(2) of the Act, 43 U.S.C. § 1610(b)(2) (Supp. II, 1972), to determine village eligibility through consideration of census date or other evidence, and to "make findings of fact in each instance."

Part of this statutory fact-finding responsibility has been delegated to the Director, Juneau Area Office of the Bureau of Indian Affairs in that it is his duty under regulations in

43 CFR 2651.2 to investigate the villages listed in the Act and publish decisions on their eligibility. It is these decisions which are appealed to this Board, and it is the Board's duty to decide, subject to the approval of the Secretary, whether these decisions were correct.

In carrying out this duty, delegated to it by the Secretary, the Board is authorized, in its discretion, to direct hearings. 43 CFR 2651.2(a)(5); 43 CFR 4.704.

It is clearly the purpose of such hearings to enable the Secretary, through the Board, to fulfill his statutory obligation of deciding village eligibility appeals with the fullest possible command of the relevant facts.

This purpose is best served by recognizing standing of a party who demonstrates a nexus with the village sufficient to assure the presentation of factual evidence relevant to the village's eligibility.

The Board will therefore be guided by a relatively broad concept of standing, particularly when the Secretary's fact-finding obligation would be thwarted by a more restrictive approach. *Bureau of Sport Fisheries and Wildlife* v. *Village of Kaguyak*, ANCAB #VE 74-9, at pp. 10-11 (1974).

The Board, after thorough review of the record and the discussion by the Judge of the evidence presented on the issue of standing, does find that the U.S. Fish and Wildlife Service has standing as a "party aggrieved" within the meaning of 43 CFR 4.700. Therefore, the Judge properly denied respondents' motion to dismiss the Fish and Wildlife Service for lack of standing to appeal.

Concerning respondents' motion that the proceeding be dismissed on the ground that the law, specifically, 43 U.S.C. § 1610(b)(3), required the Secretary to make his determination of eligibility by June 18, 1974, the Board adds the following comments to those on page 11-12 of the Recommended Decision of the Administrative Law Judge.

The Board concurs with and adopts the Solicitor's Opinion, M-36876 (May 29, 1974), which held the June 18, 1974, date for determination of village eligibility to be directory. In addition, Secretarial Order No. 2965 (June 10, 1974) suspended all determinations of village eligibility or ineligibility made by the Area Director, Bureau of Indian Affairs, Juneau, Alaska, which have been or are appealed to the Alaska Native Claims Appeal Board for all purposes except as the determinations vest the Board with jurisdiction and the determinations bear on the burden of proof in hearings before the Board in the respective case. Based on the Solicitor's Opinion and the Secretarial Order, the Board concludes that it has jurisdiction in these proceedings.

Concerning respondents' motion that the parties be afforded a reasonable opportunity to file exceptions to the recommended decision, the Board adds the following comments to the discussion on page 12 of the Recommended Decision of the Administrative Law Judge.

The fact that respondents were afforded opportunity to submit proposed findings and conclusions to the Administrative Law Judge prior to the issuance of his decision satisfied the requirement that each party prior to final decision be afforded reasonable opportunity to submit proposed findings and conclusions or exceptions to the decision or recommended decision of subordinate officers. *Watson Bros. Transportation Co.* v. *United States,* 180 F. Supp. 732 (D. Neb. 1960).

Concerning respondents' motion that the issue of 25 Native residents of Bells Flats is not in issue in this case and respondents' motion that on questions involving the eligibility of a village, the Natives claiming residence therein are necessary parties to any proceeding, both of which were properly denied by the Administrative Law Judge, the Board makes the following elaboration upon the Judge's discussion on page 10 of his Recommended Decision.

The Board has previously ruled that it does have jurisdiction to determine the residence of enrolled Natives in connection with a review of the determination of village eligibility. *Bureau of Sport Fisheries and Wildlife* v. *Uyak,* ANCAB #VE 74-11 at 15-21 (1974). Furthermore, the Board has ruled that the Board is not adjudicating individual rights, but rather the rights of the village as an entity. *Bureau of Sport Fisheries* v. *Uyak, supra* at 15-16. Notice and opportunity for a hearing have been granted the village corporation of Bells Flats for the purpose of protecting its own rights and those of its corporate members in a determination by the Board and the Secretary of village eligibility. Therefore, these two motions were properly denied by the Administrative Law Judge.

Concerning respondents' motion challenging the Secretary's regulations, specifically those contained in 43 CFR 2651.2(b)(2), the Board rules that it is bound by the provisions of its own regulations, *McKay* v. *Wahlenmaier,* 226 F. 2d 35 (D.C. Cir. 1955), and the motion was therefore properly denied by the Administrative Law Judge on page 10 of the Recommended Decision.

The Judge has referred to respondents' argument that the Act should be liberally construed in favor of the Natives, and states that:

> The issue here is not liberal versus strict interpretation. The Natives will receive benefits under the Act regardless of the decision as to the eligibility of this village, and there is no evidence such would be less if the village is found ineligible.
>
> —Recommended Decision, p. 12

The Judge's above statement could be misinterpreted to mean that the Natives enrolled to Bells Flats would receive land benefits under 43 U.S.C. § 1613(a), regardless of the final decision on its eligibility. In fact, if Bells Flats is determined ineligible, its members would not receive any land

under 43 U.S.C. § 1613(a). Only villages determined to be eligible will receive land. Those villages determined eligible will receive proportionate amounts of 22 million acres. While the total acreage will not be changed by the eligibility or ineligibility of any one village, the proportionate share to be distributed to other certified villages will be affected. *Bureau of Sport Fisheries and Wildlife* v. *Village of Kaguyak*, ANCAB #VE 74-9 at pp. 14-15 (1974).

All motions not covered above or in the Recommended Decision, except those specifically granted or granted in effect by this decision, are hereby denied.

For the sake of clarifying the Judge's discussion on page 16 of the Recommended Decision of whether or not there were 25 or more Native residents of Bells Flats on April 1, 1970, the Board feels it would be helpful to include the following explanation of the enrollment application and the Family List.

The application form referred to is the APPLICATION FOR ENROLLMENT AS AN ALASKA NATIVE, Form 5-3802. On such form there are various requests for information such as current mailing address, name, birthdate, degree of Native blood, and names of parents. Column 16 of the form requests "Your Permanent Residence as of April 1, 1970." Columns 17 through 21 read as follows:

Column 17 Your permanent residence as of date you complete this form.

Column 18 Region and village or city where you resided on April 1, 1970, if you resided there two or more years without substantial interruption.

Column 19 Region and village or city where you previously resided for an aggregate of ten years or more.

Column 20 Region and village or city where you were born, or if outside Alaska, city and state.

Column 21 Region and Village or city from which an ancestor came.

In his discussion of the issues on the merits on page 13 of the Recommended Decision, the Judge states that the regulation relating to "identifiable physical location" contained in 43 CFR 2651.2(b)(2) will be construed in light of the statutory requirement that the 25 or more Natives be residents of an "established village" on the 1970 census enumeration date. 43 U.S.C. § 1610(b)(3)(A).

The Board observes that the criteria contained in 43 CFR 2651.2(b)(2) are a requirement to be met by both listed and unlisted villages. An unlisted village is not subject to any additional requirements with respect to its "identifiable physical location evidenced by . . ." other than those imposed upon listed villages. Both listed and unlisted villages must be "established" in the sense that they must meet the requirements of 43 CFR 2651.2(b)(2).

In his discussion of whether or not Bells Flats had on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style, the Judge finds the applicable regulation to be consistent with the statute which requires that the unlisted villages be "established" villages. 43 U.S.C. § 1610 (b)(3)(A). The Board agrees with this construction of the regulation and the statute and finds that it clarifies the Judge's earlier discussion on page 13 of the Recommended Decision and is consistent with the Board's construction of the statute and regulations.

Findings of Fact

The Board adopts the finding and conclusion of the Judge that the appellant has made out a *prima facie* case that

there were not 25 Native residents in Bells Flats in 1970 and that the respondents have not rebutted this showing.

The Board adopts the finding and conclusion of the Judge that the appellant has made out a *prima facie* case that Bells Flats did not have an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style and that the respondents have not rebutted this showing.

The Board adopts the findings and conclusion of the Judge that the appellant has made out a *prima facie* case that a majority of the residents of Bells Flats were non-Native on April 1, 1970 and that respondents have not rebutted this showing.

The Board has considered the proposed findings and conclusions submitted by the parties, and, except to the extent they have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts or because they are not relevant to the rulings that have been made. *United States* v. *Merle I. Zweifel*, 81 I.D. 323 (1974).

Decision

Pursuant to Section 11(b)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(b)(3) (Supp. II, 1972), the unlisted village of Bells Flats is hereby certified as *not* eligible for benefits under Section 14(a), 43 U.S.C. § 1613(a) (Supp. II, 1972), of the Act.

This represents a unanimous decision of the Board.

DATED this 20th day of September, 1974, at Anchorage, Alaska.

Alaska Native Claims Appeal Board

/s/ JUDITH M. BRADY
Judith M. Brady, Chairman

/s/ ALBERT P. ADAMS
Albert P. Adams, Board Member

/s/ ABIGAIL F. DUNNING
Abigail F. Dunning, Board Member

/s/ JOHN A. WALLER
John A. Waller, Board Member

APPROVED:

Secretary of the Interior

APPENDIX J

UNITED STATES DEPARTMENT OF THE INTERIOR
ALASKA NATIVE CLAIMS APPEAL BOARD

P. O. Box 2433
Anchorage, Alaska 99510

ALASKA CONSERVATION SOCIETY (KODIAK-ALEUTIAN CHAPTER), ALASKA PROFESSIONAL HUNTERS ASSOCIATION, and U.S. FISH AND WILDLIFE SERVICE, *Appellants*

v.

VILLAGE OF AYAKULIK, KONIAG, INC., and BUREAU OF INDIAN AFFAIRS, *Respondents*

ANCAB #VE 74-98
ANCAB #VE 74-104
ANCAB #VE 74-108

Involving the eligibility of the Village of Ayakulik under the Alaska Native Claims Settlement Act

DECISION

Preface

This is a decision on the eligibility of the Village of Ayakulik, Alaska, for status as a Native village under the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C., Section 1601-1624 (Supp II, 1972), hereinafter referred to as the Act, and the Secretary of the Interior's Rules and Regulations on Alaska Native Selections, 43 CFR, Part 2650. Status as a village confers certain statutory benefits under the Act, including the right to select substantial quantities of land and receive patent conferring the surface rights associated with the land. Subsurface rights to village lands may be patented to the regional corporation for the region in which the village is located.

The Act in Section 3(c) defines the term "Native village" as "any tribe, band, clan, group, village, community, or

association in Alaska listed in sections 11 and 16 of the Act, or which meets the requirements of this Act, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more natives."

Statutory criteria for village eligibility are contained in Section 11(b)(2) of the Act, 43 U.S.C. Section 1610(b)(2), which provides:

> Within two and one-half years from the date of enactment of this Act, the Secretary shall review all of the villages listed in subsection (b)(1) hereof, and a village shall not be eligible for land benefits under subsections 14(a) and (b), and any withdrawal for such village shall expire, if the Secretary determines that—
>
> (A) less than twenty-five Natives were residents of the village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; or,
>
> (B) the village is of a modern and urban character, and the majority of the residents are non-Native.
>
> Any Native group made ineligible by this subsection shall be considered under subsection 14(h).

In addition, Section 11(b)(3) of the Act, 43 U.S.C. Section 1610(b)(3), provides:

> Native villages not listed in subsection (b)(1) hereof shall be eligible for land and benefits under this Act and lands shall be withdrawn pursuant to this section if the Secretary within two and one-half years from the date of enactment of this Act determines that—
>
> (A) twenty-five or more Natives were residents of an established village on the 1970 census enu-

meration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and

(B) the village is not of a modern and urban character, and a majority of the residents are Natives.

Implementing regulations in 43 CFR 2651.2(b) provide:

(1) There must be 25 or more Native residents of the village on April 1, 1970, at shown by the census or other evidence satisfactory to the Secretary. A Native properly enrolled to the village shall be deemed a resident of the village.

(2) The village shall have had on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style and at least 13 persons who enrolled thereto must have used the village during 1970 as a place where they actually lived for a period of time: *Provided,* That no village which is known as a traditional village shall be disqualified if it meets the other criteria specified in this subsection by reason of having been temporarily unoccupied in 1970 because of an Act of God or Government authority occurring within the preceding 10 years.

(3) The village must not be modern and urban in character. A village shall be considered to be of modern and urban character if the Secretary determines that it possessed all of the following attributes as of April 1, 1970:

(i) Population over 600.

(ii) A centralized water system and sewage system serves a majority of the residents.

(iii) Five or more business establishments which provide goods or services such as transient accommodations or eating establishments, specialty retail stores, plumbing and electrical services, etc.

(iv) Organized police and fire protections.

(v) Resident medical and dental services, other than those provided by Indian Health Service.

(vi) Improved streets and sidewalks maintained on a year-round basis.

(4) In the case of unlisted villages, a majority of the residents must be Native, but in the case of villages listed in sections 11 and 16 of the Act, a majority of the residents must be Native only if the determination is made that the village is modern and urban pursuant to subparagraph (3) of this paragraph.

Regulations in 43 CFR 2651.2(a) establish a procedure for determining whether a village meets the above criteria for eligibility. Following application by the village, the determination is made by the Director, Juneau Area Office, Bureau of Indian Affairs, by a process involving publication of a proposed decision, subject to protest by interested parties; consideration of protests; and publication of a final decision on village eligibility which may be appealed to the Secretary. Appeals to the Secretary are made to an ad hoc board which he has personally appointed, at least one member of which must be familiar with Native village life. Appeals to the Board are governed by applicable regulations in 43 CFR 4.700-4.704.

43 CFR 4.704, as amended January 21, 1974 (39 F.R. 2366) provides:

Any hearing on such appeals shall be conducted by the Ad Hoc Appeals Board or a member or members thereof, or by an Administrative Law Judge of the Office of Hearings and Appeals and shall be governed insofar as practicable by the regulations applicable to other hearings under this part.

The Ad Hoc Appeals Board has subsequently been designated the Alaska Native Claims Appeal Board and will hereinafter be referred to as the Board.

The Village of Ayakulik is not listed in the Act, and was found eligible by the Director, Juneau Area Office, Bureau of Indian Affairs in a decision published in the Federal Register on May 21, 1974.

The decision was appealed by the Bureau of Sport Fisheries and Wildlife (since renamed the U.S. Fish and Wildlife Service) on June 13, 1974, the Alaska Conservation Society on June 13, 1974, and the Alaska Professional Hunters Association on June 12, 1974, hereinafter referred to as the Appellants. The Bureau of Indian Affairs, Ayakulik, Inc., and the Regional Corporation of Koniag, Inc., responded to the appeal. Following receipt and consideration of briefs and motions and issuance of certain preliminary rulings, the Board directed that a *de novo* hearing be conducted on July 27, 1974, in Kodiak, Alaska, by an Administrative Law Judge. The U.S. Fish and Wildlife Service; Ayakulik, Inc., Koniag, Inc.; and the Bureau of Indian Affairs appeared by counsel, and were given the opportunity to present oral argument and evidence, to cross-examine opposing witnesses, and to submit proposed findings of facts and conclusions of law after receipt of the hearing transcript. The Alaska Conservation Society and the Alaska Professional Hunters Association did not appear and were dismissed as parties. A representative of the former organization appeared as a witness for the Fish and Wildlife Service. The record compiled in this proceeding and now before the Board consists of the BIA case file, the Board's file containing the Notice of Appeal, pleadings, briefs, and motions and preliminary rulings thereon by the Board; exhibits submitted by the parties and admitted into evidence at the hearing; the hearing transcript; proposed findings of fact and conclusions of law submitted by the parties; and a recommended decision submitted by the Administrative Law Judge to the Board. It is on this record taken as a whole that the Board reaches its decision.

Issues

The Appellant contends that the decision of the Area Director was in error because (1) there were not 25 or more Native residents of the village on April 1, 1970, (2) the village did not have on April 1, 1970, as identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style, (3) at least 13 persons who enrolled thereto did not use the village during 1970 as a place where they actually lived for a period of time, and (4) a majority of the residents of the alleged "village" are not Native as required by 43 CFR § 2651.2 (b)(4), and as defined by Section 3(c), 43 U.S.C. § 1602(b).

Stipulation

It was stipulated that the provisions in 43 CFR 2651.2 (b)(2) referring to an Act of God causing temporary unoccupancy were not involved in the case (Tr I, 7).

Rulings on Motions

The Board concurs with and adopts the Administrative Law Judge's rulings on motions brought forward at the pre-hearing conference and hearing, with the following clarification and discussion which does not alter or modify the rulings of the Judge.

Residence

Insofar as an issue presented for decision in this appeal is whether or not the village of Ayakulik had 25 Native residents on April 1, 1970, and Respondent has moved to exclude consideration of the question of residence of enrolled persons, it is appropriate to discuss the Board's jurisdiction to consider evidence on residence, and the Board's definition of residence within the contemplation of the Act and implementing regulations.

Board's Jurisdiction to Review Residence

The Bard reaffirms its previous rulings on its jurisdiction to review the residence of enrolled Natives in *Department of Natural Resources, State of Alaska, et al,* v. *Village of Manley Hot Springs, et al,* ANCAB #VE 74-6, VE 74-15, VE 74-16 (June 10, 1974) at pp. 14-19:

> As to the assertion that certain issues relating to enrollment are outside the Board's jurisdiction:
>
> (a) Enrollment for purposes of determining the status and eligibility of the individuals as Alaska Natives is outside the jurisdiction of the Board, and the Board will not hear appeals from Decisions of the Enrollment Coordinator.
>
> (b) The Enrollment Coordinator is not a necessary party before the Board because the only administrative determination properly appealed and within the Board's jurisdiction on this appeal is the Final Decision of the Area Director on the eligibility of the village.
>
> (c) The regulations in 43 CFR § 2651.2(b)(1) provide for an investigation and examination by the Area Director of "available records and evidence that may have a bearing on the character of the village and its eligibility."
>
> (d) The regulations in 43 CFR § 2651.2(b)(1) direct the Area Director to consider the residence of Natives "properly" enrolled to the village as shown on the roll, but also direct the Area Director to consider the census and other evidence.
>
> (e) Since the regulations thus recognize that the determinations of village eligibility and enrollment are separate decisions, made by separate officers, under separate procedures, this Board has jurisdiction to review the final decision of the Area Director on the eligibility of the village . . . but is not required to review

> the enrollment of the individuals as determined by the Enrollment Coordinator.
>
> Therefore, in deciding appeals from the Area Director's decisions on village eligibility, where the question of whether a village has the requisite minimum of 25 Native residents, as set forth in 43 CFR § 2651.2(b)(1), is in issue, the Board will consider evidence on such questions including, but not limited to, evidence of residence as shown on the roll.—Order Denying Motions to Dismiss, dated March 25, 1974.
>
> This order constitutes a ruling by the Board that it does have jurisdiction to determine the residence of enrolled Natives in connection with the determination of village eligibility.—*Manley Hot Springs,* supra, pp. 14-15 (1974)

Basis of Jurisdiction on Residence

This decision is based on construction of the Act and applicable regulations.

Section 5(a):

> The Secretary shall prepare within two years from the date of enactment of this Act a roll of all Natives who were born on or before, and who are living on, the date of the enactment of this Act. *Any decision of the Secretary regarding eligibility for enrollment* shall be final. (Emphasis added)

The finality of the Secretary's decision goes to eligibility, i.e., determination of sufficient blood quantum for individual placement on the Roll.

Section 5(b):

> The roll prepared by the Secretary *shall show* for each Native, among other things, the region and the village or other place in which he resided on the date of the 1970 census enumeration, and he shall be enrolled according to such residence. (Emphasis added)

There is no inference of finality of decision insofar as the residence of individuals on the role is concerned, according to the language in the Act. However, the language "shall show" establishes a strong presumption of the correctness of the residency shown on the Roll. To interpret otherwise would lead to the conclusion that the Roll, insofar as it presumes to establish residence, is a futile endeavor.

Finally, the Roll signed by the Bureau of Indian Affairs Enrollment Coordinator and approved by the Secretary on December 17, 1973, certifies only that persons listed on the Roll were determined to be eligible for enrollment as Alaska Natives.

> Upon completion, the Coordinator shall affix to the Roll a certificate indicating that to the best of his knowledge and belief the Roll contains only the names of persons who were determined to meet the requirements for enrollment as Alaska Natives. The Roll shall be submitted to the Secretary for approval. (25 CFR 43h.9)

The differing language of the statute regarding eligibility and residency on the roll reflects a unique Indian enrollment required by the Alaska Native Claims Settlement Act. Since the settlement involves both land and money entitlements, and since these settlement entitlements accrue, in most part, (exceptions in § 14(h)) to regional and village corporations and enrollee-stockholders of these corporations, the roll had first to establish who was eligible to participate in the benefits of the settlement—i.e., who was an Alaskan Native. Second, the roll had to provide the basis for determining the kinds of benefits an individual would receive—i.e., whether as a stockholder of a village corporation and /or, a stockholder of a regional corporation. Third, the roll had to provide, on the basis of an individual's claimed residence, information as to the proportional amount of land and money entitlements the village and regional corporations will receive insofar as these are based on population.

Certification of the roll with a final determination as to eligibility of Natives and a showing of residency to determine individual benefits and assignment of proportional money and land entitlements to the village and regional corporations occur, under the timetable in the Act, prior to a determination of village eligibility.

Determination of village eligibility, under the Act and regulations, occurs after completion of the roll, but nevertheless requires a second round of fact finding.

Section 3(c):

> "Native village" means any tribe, band, clan, group, village, community, or association in Alaska listed in Sections 11 and 16 of this Act, or which meets the requirements of this Act, and *which the Secretary determines* was on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, *who shall make findings of fact in each instance*), composed of twenty-five or more Natives. . . . (Emphasis added)

The determination by the Secretary as to what qualifies as a Native village must be based on findings of fact, according to the language of the statute.

Section 11(b)(2):

> Within two and one-half years from the date of enactment of this Act, the Secretary *shall review* all of the villages listed in subsection (b)(1) hereof, and a village shall not be eligible for land benefits under subsections 14(a) and (b), and any withdrawal for such villages shall expire *if the Secretary determines that*—
>
> > (A) less than twenty-five Natives were residents of the village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; or,

(B) the village is of a modern and urban character and the majority of the residents are non-Native. (Emphasis added)

Section 11(b)(3):

Native villages not listed in subsection (b)(1) hereof shall be eligible for land and benefits under this Act and lands shall be withdrawn pursuant to this section *if the Secretary* within two and one-half years from the date of enactment of this Act, *determines* that—

(A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and

(B) the village is not of a modern and urban character, and a majority of the residents are Natives. (emphasis added)

The statutory language mandates a Secretarial review and fact-finding before final determination of the eligibility of a village, and the mandate is inclusive as to the requirements for eligibility—25 residents of a village on April 1, 1970, and that the village not be of a modern and urban character.

Again, under the timetables in the Act, decisions as to eligibility and a showing of residency occur first: "The Secretary shall prepare *within two years* from the date of enactment of this Act, a roll. . . ." § 5(a) (emphasis added). "*Within two and one-half years* from the date of enactment of this Act, the Secretary shall review all of the villages . . ." § 11(b)(2) and (3). (Emphasis added)

Instead, Congress mandated that the Secretary, with the roll completed and information on it available to him, make a review and finding of fact on every village to determine whether it was, on the April 1, 1970 census date, composed

of 25 native residents and was not modern and urban in character.

Because the compilation and certification of the roll precedes in time the determinations of village eligibility, Congress had the opportunity to require that residency as indicated on the roll was to be conclusive for the purposes of determining village eligibility. The fact that Congress did not so provide indicated that Congress did not intend for the residency as indicated on the roll to be conclusive for such purposes.

If the residence as shown on the roll is, as Respondents argue, conclusive on the issue of the residence of enrolled Natives, there would be no need to make a review and findings of fact in the determination of 25 residents.

Interior Department regulations affecting Native land selection reflect compliance with the Congressional fact-finding and review mandate in 43 CFR Part 2650.

§ 2651.2(a):

Pursuant to Sections 11(b) and 16(a) of the Act, the Director, Juneau Area Office, Bureau of Indian Affairs, shall review and make a determination not later than December 19, 1973, as to which villages are eligible for benefits under the Act.

The parts following provide regulations for such determinations, including appeal procedures to this Board.

The residence criteria pertaining to village eligibility are contained in § 2651.2(b)(1):

There must be twenty-five or more Native residents of the village on April 1, 1970, as shown by the census or other evidence satisfactory to the Secretary. A Native properly enrolled to the village shall be deemed a resident of the village.

If this paragraph contained only the first sentence, there would be clearly no question regarding the Board's jurisdiction to review the issue of residence. It is the second sentence which has been asserted as a conclusive presumption in favor of residence as determined by the Enrollment Coordinator. However, this construction renders the word "properly" superfluous in the sentence. Reading the sentence with the word "properly," however, seems to conflict with the phrase "shall be deemed," since a Native "resident" of a village is necessarily "properly enrolled" to the village. Giving effect to both the word "properly" and the phrase "shall be deemed" in the sentence clearly creates a rebuttable presumption that a Native who is enrolled to a village is a resident of that village.

This construction is consistent with other rebuttable presumptions normally used by courts and administrative agencies, such as the presumption that public officials have performed their duty in the proper manner, and the presumption that a person's statements on an official government form are true and accurate to the best of his knowledge and belief.

This rebuttable presumption was adopted by the Board for all village eligibility appeals concerning villages listed in Section 11(b)(1) of the Act. *Department of Natural Resources, State of Alaska, et al,* v. *Village of Manley Hot Springs, et al,* ANCAB, VE 74-6 VE 74-15, VE 74-16 (June 10, 1974).

> b. Persons who appear on the Roll of Alaska Natives as residents of a named village are rebuttably presumed to be residents of the village named for purposes of village eligibility determination.—*Manley Hot Springs,* supra, at page 19 (1974).

The rebuttable presumption is consistent with Section 5(b) of the Act.

Therefore, the Board concludes that it has jurisdiction to review the residence of individuals enrolled as Alaska Natives for purposes of village eligibility determinations. The Board also rules that it does not have jurisdiction to review the determination of the Enrollment Coordinator, that a person meets the requirements for enrollment as an Alaska Native, since such determinations have been vested in the Enrollment Coordinator and the Regional Solicitor by regulations in 25 CFR Part 43h, subject only to the approval of the Secretary, pursuant to 25 CFR 43h.9. The Board takes official notice that persons listed as eligible on the Roll of Alaska Natives approved by the Secretary are "Natives" within the meaning of the Act and regulations.

Definition of Permanent Residence

For determinations of village eligibility, the Board adopts the same definition of residence used by the Enrollment Coordinator, contained in 25 CFR 43h.1(k):

> "Permanent residence" means the place of domicile on April 1, 1970, which is the location of the permanent place of abode intended by the applicant to be his actual home. It is the center of the Native family life of the applicant to which he has the intent to return when absent from that place. A region or village may be the permanent residence of an applicant on April 1, 1970, even though he was not actually living there on that date, if he has continued to intend that place to be his home.

It is helpful to compare this definition of permanent residence with the concept of "home," defined in the *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 12, (1971) as "the place where a person dwells and which is the center of his domestic, social, and civil life." The comments indicated that when determining whether a place is a person's home, consideration should be given to its physical characteristics, the time one spends there, the

things one does there, his intention when absent to return to that place, other dwelling places of the person and similar factors concerning those other dwelling places. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS*, § 12, Comment C at 50 (1971).

Other factors in the definition in 25 CFR 43h.1(k) recognize the special situation of Alaska Natives, where Native family life may be characterized by patterns of kinship and activities substantially different from non-Native family life. In addition, the definition recognizes the frequently transient life style of Alaska Natives. Thus, the definition emphasizes the factors of Native family life and intent to return.

While intent is obviously subjective and personal, it is frequently capable of objective proof, and where objective evidence is presented which contradicts subjective intent, and the objective evidence is neither rebutted nor explained, it will clearly be persuasive. On the other hand, where economic, educational, or other requirements have temporarily deprived one of any real choice, and both the subjective intent and the objective evidence indicate a genuine connection with the place of enrollment, that place is considered to be the permanent residence of the individual within the meaning of 25 CFR 43h.1(k), notwithstanding that for other purposes a court or an administrative agency may find that person's residence or domicile to be some place other than his "permanent residence" as determined for purposes of the Alaska Native Claims Settlement Act.

A letter from Curt Berklund, Deputy Assistant Secretary of the Interior, dated February 27, 1973, to Morris Thompson, Area Director, Bureau of Indian Affairs, Juneau, Alaska, which interprets the definition of "permanent residence" in 25 CFR 43h.1(k), has figured prominently in

several village eligibility appeals. The pertinent paragraph in the letter reads:

> The primary point of confusion is who now living out-of-state enrolls back to Alaska. *Under the above definition a person who has at one time lived in a village or other place in Alaska and considered that place to be his permanent residence on April 1, 1970, and intends to return to that place must enter that place in column 16 on the application form and be enrolled there.* If he considered some place outside of Alaska as his permanent residence on April 1, 1970, and intends to return there, he *must* enter that place in column 16. *There is no "choice" involved. Under no circumstances* may an individual who has never lived in *Alaska enroll to a village in Alaska through personal choice* by entering a village name in column 16 on the application form. The only way in which a person who has never lived in Alaska may be enrolled in Alaska would be by (1) showing an out-of-state permanent residence in column 16 of the application form and (2) voting "No" on the establishment of a 13th regional corporation. He would then be enrolled by the Secretary in one of the twelve regions in Alaska based upon the priorities listed in Section 5(c) of the Act. (emphasis in original)

Considered in the context of the enrollment regulations in 25 CFR 43h, and with particular reference to the problem addressed by this letter—that is, the enrollment of persons who are residents outside the state of Alaska—the letter is not inconsistent with the interpretation of "permanent residence" adopted by the Board; but neither is it particularly relevant to the problem of how the place of "permanent residence" should be determined. There is no disagreement with the proposition that one should be enrolled to his "permanent residence."

Standing

Appellant's standing is challenged on the grounds that they cannot be a "party aggrieved" within the meaning of 43 CFR 4.700 because, as a Government agency, they are not eligible for status as a party and because they have failed to assert a real injury.

Neither the Act nor its legislative history can be construed as affirmatively prohibiting the recognition in the proper circumstances of an agency as an aggrieved party. The fact that Congress made no express provision for the formal participation of the Appellant in the determination of village eligibility cannot be read as a constructive denial of standing.

Except for Section 2(b) of the Act which states, "the settlement should be accomplished rapidly * * * with maximum participation by Natives in decisions affecting their rights and property * * * *," the Act does not expressly contemplate participation by parties other than the Secretary in the determination of village eligibility. A logical result of Respondents' argument would be that no one could appeal a decision certifying a village as eligible since Congress had not specifically provided. The Board rejects this argument.

Furthermore, a public official or his agency has authority to challenge action taken by another federal agency when the action of the other agency is disturbing the congressional policy administered by him. *U.S. ex rel. Chapman* v. *Federal Power Commission,* 345 U.S. 153 (1953).

Respondents' contention, that Appellant lacks standing as an aggrieved party because of a failure to assert sufficient injury, must be examined carefully. It is helpful to review the rationale and development of the concept of standing.

The requirement of standing dictates that each party to litigation should have some interest therein, and operates

to protect both individual parties and the judicial process. This requirement recognizes that it is intrinsically unfair to expose an individual party to the trouble and expense of a frivolous suit, instigated by an opposing party who has suffered no real harm from the actions of the defendant. It also recognizes the reliance of the court, in the adversary system, on the ability of the parties before it to present relevant evidence. The issue of standing focuses on the party seeking to get his complaint before the court, to ascertain that he has such a personal stake in the outcome as to assure the "concrete adverseness" which sharpens the presentation of issues on which the court depends. *Flast* v. *Cohen,* 392 U.S. 320 (1968); *Baker* v. *Carr,* 369 U.S. 186 (1962).

Pursuing this concept, the courts have developed a dual test of standing; to have standing, a party must allege injury, in fact, to an interest within a zone of interest protected by the statute or constitutional guarantee invoked. *Association of Data Processing Service Organizations* v. *Camp,* 397 U.S. 150 (1970); *Barlow* v. *Collins,* 397 U.S. 159 (1970). Not only must the injury alleged be a cognizable interest, but the party alleging it must himself be among the injured. *Sierra Club* v. *Morton,* 405 U.S. 727 (1972). The injury must be real, not remote or speculative; a plaintiff must allege "that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." *U.S.* v. *SCRAP,* 412 U.S. 669, 688-9 (1973).

It is recognized, as argued by the Respondents, that courts have applied these tests to determine the standing of litigants before them. However, it must also be remembered that the Board is an administrative body, not a court.

The Board acts in this proceeding for the Secretary, who has been directed by Congress in Section 11(b)(3) of the Act to determine village eligibility through consideration

of census data or other evidence, and to "make findings of fact in each instance."

Part of this statutory fact-finding responsibility has been delegated to the Director, Juneau Area Office of the Bureau of Indian Affairs in that it is his duty under regulations in 43 CFR 2651.2 to investigate the villages listed in the Act and publish decisions on their eligibility. It is these decisions which are appealed to this Board, and it is the Board's duty to decide, subject to the approval of the Secretary, whether these decisions were correct.

In carrying out this duty, delegated to it by the Secretary, the Board is authorized, in its discretion, to direct hearings. (43 CFR 2651.2(a)(5); 43 CFR 4.704)

It is clearly the purpose of such hearings to enable the Secretary, through the Board, to fulfill his statutory obligation of deciding village eligibility appeals with the fullest possible command of the relevant facts.

This purpose is best served by recognizing standing of a party who demonstrates a nexus with the village sufficient to assure the presentation of factual evidence relevant to the village's eligibility.

The Board will therefore be guided by a relatively broad concept of standing, particularly when the Secretary's fact-finding obligation would be thwarted by a more restrictive approach.

This is consistent with the approach followed in other proceedings before the Department of the Interior. In *Navajo Tribe of Indians* v. *Utah*, 12 IBLA 5, 80 I.D. 441 (1973), the Tribe was accorded standing to challenge issuance of a confirmatory patent to Utah, based on prior occupancy of the patented lands by individual Navajos—although such occupancy, if proven, would have defeated the Tribe's claim to, and interest in, the lands. In *Crooks Creek Commune*, 10 IBLA 243 (1973), the Interior Board of Land Appeals recognized standing of a commune consisting of

some ten people to appeal the proposed logging of lands adjacent to their property, despite the fact that the Commune asserted no legal interest in such lands and despite uncertainty as to the group's legal status as an entity.

It must also be remembered that the "injury in fact" test imposed by the courts is itself a liberal standard. Denial of standing to the Sierra Club in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), was based on the Club's failure even to allege that it or its members would be affected by the action complained of, rather than on the type of harm alleged. And in *U.S.* v. *SCRAP*, 412 U.S. 669 (1973), the court deemed plaintiffs to have alleged perceptible harm based on allegations that their use of natural resources in Washington, D.C. area would be disturbed by the adverse environmental effects of nonuse of recyclable goods, which plaintiffs asserted would result from a railroad freight surcharge on such goods.

As to the standing of the Fish and Wildlife Service, Respondents concede in their Post-Hearing Brief that Ayakulik must, by reason of its location, select substantially all of its 69,120 acre entitlement from within the 1,820,000 acre Kodiak National Wildlife Refuge. (Respondents' Post-Hearing Brief, p. 19)

The Board considers it proper to note that Appellant's interest in the present appeal derives from its management responsibility for the Kodiak National Wildlife Refuge as a whole, and must be considered in that context. To draw a quantitative comparison between the land entitlement of a village or villages and the total acreage of the Refuge is not relevant to Appellant's interest in the matter. The Board has held, in prior decisions cited by the Judge on page 4 of his Recommended Decision, that the Fish and Wildlife Service has standing to challenge the eligibility of a village with potential land selection rights in a national wildlife refuge.

Respondents argue vigorously that injury to the Refuge inherent in the loss of such a substantial quantity of land

is ameliorated by other provisions in the Act. They point out that under Section 22(e), the Secretary may add to the Refuge other public lands in Alaska, to replace these selected by a village; and that under Section 22(g), the United States reserves a right of first refusal if village lands within the Refuge are ever sold, and such lands remain subject in any event to the laws and regulations governing the use and development of the Refuge. (Respondents' Post-Hearing Brief, pp. 19-22)

However, the Board is not persuaded that these provisions operate to deprive Appellant Fish and Wildlife Service of standing in this appeal. In allowing village selections within wildlife refuges, Congress clearly chose between competing policies. In limiting village right in such lands, Congress clearly recognized and sought to mitigate the potential for adverse effects on the Refuge caused by its choice. It would be an unwarranted assumption, however, to conclude that these provisions completely ameliorated the potential for injury.

Albeit subject to the encumbrances imposed by Section 22(g), conveyance to a village of lands within a Refuge effects a change in the ownership of those lands, which pass from public ownership and control to at least a partial private ownership. It would be unreasonable to conclude that such a transfer would not dilute the management control which the Fish and Wildlife Service now exercises over lands within the Refuge. The uncertainties inherent in such a dilution of control (treatment of trespass, funding constraints on exercise of first refusal rights by the government in the event of future sale, dual management purposes) cannot be dismissed lightly.

It further appears to the Board that Respondent's reliance on the mitigating provisions in the Act, to negate Appellant's injury, may be misplaced. These provisions have little, if any, relevance to the injury complained of; i.e., that refuge lands would pass into the ownership of a village not

eligible under the Act to receive them. The operation of statutory safeguards when refuge lands pass to a qualified village should not foreclose Appellant from challenging the certification of a village which it believes to be ineligible.

For these reasons, the Board concludes that Appellant has a nexus with the village sufficient to assure the presentation of factual evidence relevant to the village's eligibility, and therefore has standing to appeal.

Other Motions

Concerning Respondents' motion that the proceeding be dismissed on the ground that Section 11(b)(3) of the Act, 43 U.S.C. § 1610(b)(3), required the Secretary to make his determination of eligibility by June 18, 1974, the Board adds the following comments to those on pages 5-6 of the Recommended Decision of the Administrative Law Judge.

The Board concurs with and adopts the Solicitor's Opinion, M-36876 (May 29, 1974), which held the June 18, 1974, date for determination of village eligibility to be directory. In addition, Secretarial Order No. 2965 (June 10, 1974) suspended all determinations of village eligibility or ineligibility made by the Area Director, Bureau of Indian Affairs, Juneau, Alaska, which have been or are appealed to the Alaska Native Claims Appeal Board for all purposes except as the determinations vest the Board with jurisdiction and the determinations bear on the burden of proof in hearings before the Board in the respective case. Based on the Solicitor's Opinion and the Secretarial Order, the Board concludes that it has jurisdiction in these proceedings.

Concerning Respondents' motion that the parties be afforded a reasonable opportunity to file exceptions to the recommended decision, the Board adds the following comments to the discussion on page 6 of the Recommended Decision of the Administrative Law Judge.

The fact that Respondents were afforded opportunity to submit proposed findings and conclusions to the Administrative Law Judge prior to the issuance of his de-

cision satisfied the requirement that each party prior to final decision be afforded reasonable opportunity to submit proposed findings and conclusions or exceptions to the decision or recommended decision of subordinate officers. *Watson Bros. Transportation Co.* v. *United States,* 180 F. Supp 732 (D. Neb. 1960).

ADDITIONAL DISCUSSION

Established Village with an Identifiable Physical Location Evidenced by Occupancy

Section 11(b)(3) of the Act provides that Native villages not listed therein shall be eligible for benefits if it is determines that "twenty-five or more Natives were residents of an established village on the 1970 census enumeration date * * * *".

Section 3(c) defines a Native village as "any tribe, band, clan, group, village, community or association * * * *."

The regulations in 43 CFR 2651.2(b) require that:

> [T]he village shall have had on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style * * * *.

The Administrative Law Judge interpreted the above provisions of the Act and regulations to require, as to unlisted villages, "(1) that the village be habitable—that is, have houses, huts, cabins or other structures suitable for human occupancy; and (2) that it has a center or nucleus of community or group life or association." (ALJ Recommended Decision, p. 10)

The Board observes that the criteria contained in 43 CFR 2651.2(b)(2) are a requirement to be met by both listed and unlisted villages. An unlisted village is not subject to any additional requirements with respect to its "identifiable physical location evidenced by . . ." other than

those imposed upon listed villages. Both listed and unlisted villages must be "established" in the sense that they must meet the requirements of 43 CFR 2651.2(b)(2).

In light of the above conclusion, the Board is not persuaded that, as to unlisted villages, the relevant statutory and regulatory provisions require a village to boast structures of such permanence or European character as the Judge apparently contemplates. However, the record contains virtually no evidence that Ayakulik had an identifiable physical location evidenced by occupancy of any kind, whether occupancy involving the use of such structures, or occupancy through use of less permanent shelters. Rather, the evidence indicates a total lack of human habitation, with the exception of summer occupancy of the weir site cabin by employees of the State Fish and Game Department. The Judge found that this evidence, which was unrebutted, raised a substantial doubt as to whether Ayakulik had an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style. (ALJ Recommended Decision, p. 12) The Board concurs in this finding, and accordingly does not find it necessary to reach the question of precisely what sort of structures, if any, are within the contemplation of statutory and regulatory requirements relating to identifiable physical location and occupancy of the village site.

Decision

The Administrative Law Judge, in his Recommended Decision, summarized and analyzed the evidence relevant to each issue raised by this appeal (ALJ Recommended Decision, pp. 9-16); and stated his findings of fact and conclusions of law on each issue. (ALJ Recommended Decision, p. 16) The Board, having reviewed the entire record in this appeal, concurs in the Judge's summary and analysis of the evidence and finds that the Judge made proper findings of fact and conclusions of law; the Board therefore adopts and incorporates in its Decision the Recommended Decision of

the Administrative Law Judge set forth in Appendix I, except as modified herein.

The proposed findings of fact and conclusions of law submitted by the parties have been considered and, except to the extent they have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts or becaus they are not relevant to the rulings that have been made. *United States* v. *Merle I. Zweifel*, 80 I.D. 323 (1973).

Except to the extent that this decision reflects a favorable disposition, all pending motions are denied.

Pursuant to Section 11(b)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(b)(3) (Supp. II, 1972), the unlisted village of Ayakulik is hereby certified as *not* eligible for benefits under Section 14(a) 43 U.S.C. § 1613(a) (Supp. II, 1972) of the Act.

This represents a unanimous decision of the Board.

DATED this 26th day of September, 1974, at Anchorage, Alaska.

/s/ JUDITH M. BRADY
Judith M. Brady, Chairman
Alaska Native Claims Appeal Board

/s/ ALBERT P. ADAMS
Albert P. Adams, Board Member

/s/ ABIGAIL F. DUNNING
Abigail F. Dunning, Board Member

/s/ JOHN A. WALLER
John A. Waller, Board Member

APPROVED: October 3, 1974

/s/ ROGERS C. B. MORTON
Secretary of the Interior

APPENDIX K

UNITED STATES DEPARTMENT OF THE INTERIOR
ALASKA NATIVE CLAIMS APPEAL BOARD

P. O. Box 2433
Anchorage, Alaska 99510

STATE OF ALASKA, ALASKA CONSERVATION SOCIETY, ALASKA PROFESSIONAL HUNTERS ASSOCIATION, INC., FOREST SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, and RALPH & ETHEL BEAMER, *Appellants*

v.

VILLAGE OF PORT WILLIAM, KONIAG, INC., and BUREAU OF INDIAN AFFAIRS, *Respondents*

ANCAB #VE 74-97
ANCAB #VE 74-100
ANCAB #VE 74-103
ANCAB #VE 74-107
ANCAB #VE 74-110

Involving the eligibility of the Village of Port William for benefits under the Alaska Native Claims Settlement Act of December 18, 1971.

DECISION

Preface

This is a decision on the eligibility of the village of Port William, Alaska, for status as a Native village under the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. Section 1601-1624 (Supp. II, 1972), hereinafter referred to as the Act, and the Secretary of the Interior's Rules and Regulations on Alaska Native Selections, 43 CFR Part 2650. Status as a village confers certain statutory benefits under the Act, including the right to select substantial quantities of land and receive patent

conferring the surface rights associated with the land. Subsurface rights to village lands may be patented to the regional corporation for the region in which the village is located.

On August 6, 1974, an Administrative Law Judge conducted a hearing on the appeals of the Forest Service, United States Department of Agriculture, State of Alaska, Alaska Conservation Society, Alaska Professional Hunters Association, Inc., and Ralph and Ethel Beamer, in the matter of the eligibility of the village of Port William for benefits under the Act.

The parties were afforded an opportunity to file briefs and recommended findings of fact and conclusions of law with the Judge after reecipt of the hearing transcript.

On September 5, 1974, the Judge issued his Recommended Decision which was received by the Alaska Native Claims Appeal Board on September 25, 1974. The Recommended Decision states the background of the case, and properly outlines the applicable law and regulations and the procedural guidelines under which the Board has determined previous village eligibiltiy appeals.

Basis for Decision

The record compiled in this proceeding and now before the Board consists of the Notices of Appeal, pleadings, briefs, and motions and preliminary rulings thereon by the Board; exhibits submitted by the parties and admitted into evidence at the hearing; the hearing transcript; proposed findings of fact and conclusions of law submitted by the parties; and a recommended decision submitted by the Administrative Law Judge to the Board. It is on this record taken as a whole that the Board reaches its decision.

Motions

The Board, having reviewed the entire record in this matter, finds that the Judge made proper rulings on pending motions both prior to and during the hearing and adopts and concurs in the rulings made by the Judge in his Recommended Decision, except to the extent modified herein.

Respondents have made a motion to dismiss this appeal on the basis that the Natives who are enrolled as residents of the village of Port William are necessary parties to the determination of the eligibility of the village for benefits under Section 11(b)(3) of the Act. The Administrative Law Judge denied respondents' motion. The Board concurs.

The principle question before the Board on this appeal is whether *the village* qualifies for land selection benefits under the Act. The Board has previously held that the determinations of the Enrollment Coordinator are not appealable to this Board, and therefore the Board does not assume jurisdiction to change or correct the enrollment of individuals as shown on the Roll. *Department of Natural Resources, State of Alaska* v. *Village of Manley Hot Springs*, ANCAB, VE 74-6, VE 74-15, VE 74-16 (June 10, 1974); *Bureau of Sport Fisheries & Wildlife* v. *Village of Kaguyak*, ANCAB, VE 74-9 (June 10, 1974). As contemplated by the Act, individual participation in benefits under the Act is dependent upon enrollment as a member of a region or village. *Bureau of Sport Fisheries & Wildlife* v. *Village of Pauloff Harbor (Sanak)*, ANCAB, VE 74-92, VE 74-93, VE 74-94 (June 9, 1974). Thus, since the Board's decisions do not purport to affect any individual enrolled stockholder in a village corporation in any manner different from the aggregate of all the corporation's stockholders, the participation of each individual stockholder as a party is not considered necessary. It is well established that the individual stockholders are not necessary parties to an action which affects only the rights of the corporate

body as a whole. See generally: 19 Am. Jur. 2d *Corporations* §§ 526, 591-594, and 1454 (1965).

The respondents also moved that the proceeding be dismissed on the ground that the Secretary of the Interior and the Board have lost jurisdiction over these appeals by virtue of the time limitation expressed in Section 11(b)(3) of the Act, 43 U.S.C. § 1610(b)(3).

The Board concurs with and adopts the Solicitor's Opinion, M-36876 (May 29, 1974), which held the June 18, 1974, date for determination of village eligibility to be directory. In addition, Secretarial Order No. 2965 (June 10, 1974) suspended all determinations of village eligibility or ineligibility made by the Area Director, Bureau of Indian Affairs, Juneau, Alaska, which have been or are appealed to the Alaska Native Claims Appeal Board for all purposes except as the determinations vest the Board with jurisdiction and the determinations bear on the burden of proof in hearings before the Board in the respective case. Based on the Solicitor's Opinion and the Secretarial Order, the Board concludes that it has jurisdiction in these proceedings.

The respondents moved that 43 CFR Section 2651.2(b)(2), excluding the Act of God or government proviso, be declared invalid as unauthorized by the Alaska Native Claims Settlement Act.

The Board concurs with the denial of the motion on the basis that the Board is bound by the regulations issued by the Secretary of the Interior. *McKay* v. *Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955).

The Forest Service moved, after completion of the hearing, for admission of newly discovered evidence. In light of the disposition of this appeal, *infra*, the Board finds it unnecessary to rule on that particular motion, and therefore neither concurs nor disagrees with the Judge's ruling on that motion and the Forest Service's conditional request

for a new hearing in the event that such evidence is not admitted.

Except to the extent modified herein, the Board adopts and incorporates the rulings on motions as set forth by the Judge in his Recommended Decision on pages 8-14. All other motions except those granted in effect by this decision are hereby denied.

The Board, having reviewed the entire record, adopts and incorporates the discussion by the Judge outlining the stipulations agreed to by the parties, the summary of the documentary evidence and the summary of the testimony.

Issues

The general issue in this case is whether the village of Port William meets the village eligibility requirements of Section 11(b)(3), 43 U.S.C. Section 1610(b)(3), of the Act and 43 CFR 2651.2(b). The specific issues are:

1. Whether the village of Port William had 25 or more Native residents on April 1, 1970, as shown by the census or other evidence satisfactory to the Secretary:

2. Whether the village of Port William had on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style;

3. Whether at least 13 Natives who are enrolled residents of the village of Port William used the village during 1970 as a place where they actually lived for a period of time; and

4. Whether the majority of the residents of the village of Port William are Natives.

Discussion

The Board notes on page 35 of the Administrative Law Judge's Recommended Decision on apparent misstatement

of the probably whereabouts of Mr. Bernard Wamser on April 1, 1970; ie, the fact that Mr. Wamser on that date applied for a license to fish in Bristol Bay does not imply that he was, as stated by the Judge, in Bristol Bay on April 1, 1970. The matter does not affect the ultimate conclusions of the Judge or the Board regarding Mr. Wamser's residence and is noted merely for clarity.

On pages 37-38 of his Recommended Decision, the Judge, while discussing the residences of minors born after April 1, 1970, has implied that the Board, based on its decision in *Bureau of Sport Fisheries & Wildlife* v. *Village of Paul-off Harbor,* ANCAB VE 74-92 at page 19 (1974), would require only that a child be conceived on April 1, 1970, in order to be a "permanent resident" of a particular village.

For clarification of this matter, the Board rules that a minor cannot be a resident of a village under the Act unless he or she has been born and is living on April 1, 1970. *Forest Service* v. *Village of Kasaan,* ANCAB VE 74-17 at pages 12-22 (June 10, 1974). 25 CFR 43h.1(k) defines "permanent residence" in part as "place of domicile." The legal concept of dimicile attaches only at birth, and the infant's domicile is, by operation of law, that of the parents on whom he or she is dependent. 25 Am. Jur. 2d *Domicil* §§ 4, 12, 15, 63 (1966). This clarification does not affect the findings of the Judge as set forth on pages 37-38 of the Recommended Decision.

In his discussion on pages 42-44 of the Recommended Decision concerning Mary Bond, Nikki Woolridge, Robert Stamp, Ann Cichoski, Corrine Wilson, Florence Cratty, Lois Stover, William Hartmann, Daniel and Barbara Hansen and their children, and their respective permanent residences, the Judge finds and concludes that the Forest Service has not sustained its initial burden of proof with respect to the non-residence of these individuals. The Judge concludes that the inconsistent responses as indicated on the Family List and the minimal additional documentary evi-

dence submitted by the appellant is insufficient to raise a substantial doubt with respect to the claim of residency, relying on the Board's decision in *State of Alaska* v. *Village of Manley Hot Springs,* ANCAB VE 74-6 at pages 23-24 (June 10, 1974).

The Board concurs with the Judge's interpretation of the holding in *Manley Hot Springs,* that inconsistent responses contained in the Family List are insufficient by themselves to raise a substantial doubt as to the claimed residence of the above 12 enrollees. The Board further concurs with the conclusion of the Judge that the documentary evidence introduced by the Forest Service is not sufficient, in conjunction with the inconsistent responses of the Family List, to raise a substantial doubt about the residency of these 12 individuals. The Board does find and conclude, however, that the Family List and documentary evidence introduced by appellant, in conjunction with the testimony of appellant's witnesses relating to the number of Native residents in the area and the lack of use and occupancy by the 43 Natives enrolled to the village of Port William, is sufficient to sustain the burden of disproving the residence of all 43 Natives enrolled to Port William including those 12 named above. To the extent modified above, the Board hereby adopts and incorporates the findings and conclusions of the Judge in his Recommended Decision relating to the residence of the 43 Natives enrolled to Port William.

Majority of Residents Must Be Native

Because the Board concurs with the finding of the Judge on page 44 of his Recommended Decision that Port William does have approximately seven or eight non-Native residents, and because the Board has concluded that none of the 43 Natives enrolled to Port William are permanent residents of the village of Port William, the Board necessarily finds and concludes that the Forest Service has

sustained its burden of proof that a majority of the residents are non-Native.

Use By 13 Native Residents

Because the Board has concluded that none of the 43 Natives enrolled to Port William are, in fact, permanent residents of the village of Port William, the Board finds and concludes that the Forest Service has sustained its burden of proof with respect to the non-use of the site of 13 enrolled Native residents in 1970.

Not only must 13 Natives enrolled to the village have used the village during 1970 as a place where they actually lived for a period of time; these 13 enrollees must also be shown to be residents of the village in order to be counted toward the number who used the village during 1970. In other words, as indicated in the Board's discussion of its jurisdiction to review residence, only Natives properly enrolled to a village, i.e., residents of the village, may be considered in determining whether or not 13 Natives enrolled to the village have used the village during 1970 as a place where they actually lived for a period of time. *Forest Service* v. *Village of Kasaan,* supra, at pages 6-10 (June 10, 1974).

Therefore, the Board's conclusions that none of the 43 Natives enrolled to the village of Port William are residents thereof, precludes any finding that 13 enrolled Native residents used the village in 1970 as a place they actually lived for a period of time.

Identifiable Physical Location

Based on the testimony and documentary evidence, outlined by the Judge in his Recommended Decision, the Board finds and concludes that appellant has sustained its burden of proof with respect to the issue of whether or not Port William had on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style.

Port William did have on April 1, 1970, an identifiable physical location, at which there existed a cold storage plant, a few residences, tool sheds and docks. This site, however, was not evidenced by occupancy consistent with the Natives' own cultural patterns and lifestyles, but rather by seasonal occupancy consistent with a commercial fishery and storage plant. The character and purpose of the facilities located at the physical site are related solely to a commercial enterprise centered on the sale of fish by Natives and non-Natives and the sale of supplies and fuel to Natives and non-Natives. There is no evidence that a traditional village ever existed at the site of Port William or that there has been any use of occupancy other than that described above. The Board finds and concludes that the Forest Service has sustained its burden of proving that Port William did not have on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and lifestyle.

Except to the extent modified herein, the Board hereby adopts and incorporates the Recommended Decision of the Judge set forth in the Appendix hereto.

Decision

Pursuant to Section 11(b)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(b)(3) (Supp. II, 1972), the unlisted village of Port William is hereby certified as *not* eligible for benefits under Section 14(a), 43 U.S.C. § 1613(a) (Supp. II, 1972), of the Act.

This represents a unanimous decision of the Board.

DATED this 21st day of October, 1974, at Anchorage, Alaska.

/s/ JUDITH M. BRADY
Judith M. Brady, Chairman
Alaska Native Claims Appeal Board

/s/ ALBERT P. ADAMS
Albert P. Adams, Board Member

/s/ ABIGAIL F. DUNNING
Abigail F. Dunning, Board Member

/s/ JOHN A. WALLER
John A. Waller, Board Member

APPROVED: November 1, 1974

/s/ ROGERS C. B. MORTON
Secretary of the Interior

APPENDIX I.

UNITED STATES DEPARTMENT OF THE INTERIOR
ALASKA NATIVE CLAIMS APPEAL BOARD

P. O. Box 2433

Anchorage, Alaska 99510

STATE OF ALASKA, SIERRA CLUB, and PHIL HOLDSWORTH & ALASKA WILDLIFE FEDERATION & SPORTSMEN'S COUNCIL,
Appellants

v.

VILLAGE OF SOLOMON, BERING STRAITS REGIONAL CORPORATION, and BUREAU OF INDIAN AFFAIRS, *Respondents*

ANCAB #VE 74-48
ANCAB #VE 74-44
ANCAB #VE 74-71

Involving the eligibility of the Village of Solomon for benefits under the Alaska Native Claims Settlement Act of December 18, 1971.

DECISION

Preface

In accordance with an Order issued by the Alaska Native Claims Appeals Board on May 31, 1974, an Administrative Law Judge conducted a hearing at Nome, Alaska, on July 10, 1974, on the matter of eligibility of the Village of Solomon for benefits under the Alaska Native Claim Settlement Act (the Act), 43 U.S.C. §§ 1601-1624 (Supp. II, 1972).

The parties were afforded an opportunity to file briefs recommended findings of fact and conclusions of law with the Judge after receipt of the hearing transcript.

On September 4, 1974, the Judge issued a Recommended Decision which sets forth the procedural, legal and factual background of this decision.

Basis for Decision

The record compiled in this proceeding and now before the Board consists of the BIA case file, the Board's file containing the Notice of Appeal, pleadings, briefs, and motions and preliminary rulings thereon by the Board; exhibits submitted by the parties and admitted into evidence at the hearings; the hearing transcript; proposed findings of fact and conclusions of law submitted by the parties; and a recommended decision submitted by the Administrative Law Judge to the Board. It is on this record taken as a whole that the Board reaches its decision.

Issues

The general issue in this case is whether Solomon meets the village eligibility requirements of Section 11(b)(3) of the Act and 43 CFR 2651.2. The specific issues are:

1. Were there 25 or more Native residents of the village of Solomon on April 1, 1970, as shown by the census or other evidence satisfactory to the Secretary?

2. Were there at least 13 persons enrolled to the village of Solomon who used such village during 1970 as a place where they actually lived for a period of time.

Burden of Proof

Concerning appeals relating to the eligibility of villages not listed in section 11(b)(1) of the Act, the Board is governed by the allocation of burden of proof contained in 43 CFR 2651.2(a)(9):

> Anyone appealing a decision concerning the eligibility or ineligibility of an unlisted Native village shall have the burden of proof in establishing that the decision is incorrect.

Ruling on Motions

The Board concurs in the Administrative Law Judge's rulings on motions and further clarifies its position on those motions relating to standing and the question of residence as follows:

Standing

Appellant's standing is challenged on the grounds that they cannot be a "party aggrieved" within the meaning of 43 CFR 4.700 because, as a Government agency, they are not eligible for status as a party and because they have failed to assert a real injury.

Neither the Act nor its legislative history can be construed as affirmatively prohibiting the recognition in the proper circumstances of an agency as an aggrieved party. The fact that Congress made no express provision for the formal participation of the Appellant in the determination of village eligibility cannot be read as a constructive denial of standing.

Except for Section 2(b) of the Act which states, "the settlement should be accomplished rapidly * * * with maximum participation by Native in decisions affecting their rights and property * * * *," the Act does not expressly contemplate participation by parties other than the Secretary in the determination of village eligibility. A logical result of Respondents' argument would be that no one could appeal a decision certifying a village as eligible since Congress had not specifically provided. The Board rejects this argument.

Furthermore, a public official or his agency has authority to challenge action taken by another federal agency when the action of the other agency is disturbing the congressional policy administered by him. *U.S. ex. rel. Chapman* v. *Federal Power Commission*, 345 U.S. 153.

Respondents' contention, that Appellant lacks standing as an aggrieved party because of a failure to assert sufficient injury, must be examined carefully. It is helpful to review the rationale and development of the concept of standing.

The requirement of standing dictates that each party to litigation should have some interest therein, and operates to protect both individual parties and the judicial process. This requirement recognizes that it is intrinsically unfair to expose an individual party to the trouble and expense of a frivolous suit, instigated by an opposing party who has suffered no real harm from the actions of the defendant. It also recognizes the reliance of the court, in the adversary system, on the ability of the parties before it to present relevant evidence. The issue of standing focuses on the party seeking to get his complaint before the court, to ascertain that he has such a personal stake in the outcome as to assure the "concrete adverseness" which sharpens the presentation of issues on which the court depends. *Flast* v. *Cohen,* 20 L Ed 2d 947 (1968); *Baker* v. *Carr,* 7 L Ed 2d 663 (1962).

Pursuing this concept, the courts have developed a dual test of standing; to have standing, a party must allege injury, in fact, to an interest within a zone of interest protected by the statute or constitutional guarantee invoked. *Association of Data Processing Service Organizations* v. *Camp,* 25 L Ed 2d 184 (1970); *Barlow* v. *Collins,* 25 L Ed 2d 192 (1970). Not only must the injury alleged be a cognizable interest, but the party alleging it must himself be among the injured. *Sierra Club* v. *Morton,* 31 L Ed 2d 636. The injury must be real, not remote or speculative; a plaintiff must allege "that he has been or will in fact be perceptibly harmed by the challenged that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." *U.S.* v. *SCRAP,* 37 L Ed 2d 254 (1973).

It is recognized, as argued by the Respondents, that courts have applied these tests to determine the standing of litigants before them. However, it must also be remembered that the Board is an administrative body, not a court.

The Board acts in this proceeding for the Secretary, who has been directed by Congress in Section 11(b)(3) of the Act to determine village eligibility through consideration of census data or other evidence, and to "make findings of fact in each instance."

Part of this statutory fact-finding responsibility has been delegated to the Director, Juneau Area Office of the Bureau of Indian Affairs in that it is his duty under regulations in 43 CFR 2651.2 to investigate the villages listed in the Act and published decisions on their eligibility. It is these decisions which are appealed to this Board, and it is the Board's duty to decide, subject to the approval of the Secretary, whether these decisions were correct.

In carrying out this duty, delegated to it by the Secretary, the Board is authorized, in its discretion, to direct hearings. (43 CFR 2651.2(a)(5); 43 CFR 4.704)

It is clearly the purpose of such hearings to enable the Secretary through the Board, to fulfill his statutory obligation of deciding village eligibility appeals with the fullest possible command of the relevant facts.

This purpose is best served by recognizing standing of a party who demonstrates a nexus with the village sufficient to assure the presentation of factual evidence relevant to the village's eligibility.

The Board will therefore be guided by a relatively broad concept of standing, particularly when the Secretary's fact-finding obligation would be thwarted by a more restrictive approach.

This is consistent with the approach followed in other proceedings before the Department of the Interior. In

Navajo Tribe of Indians v. *Utah,* 12 IBLA 5, 80 I.D. 441, the Tribe was accorded standing to challenge issuance of a confirmatory patent to Utah, based on prior occupancy of the patented lands by individual Navajos—although such occupancy, if proven, would have defeated the Tribe's claim to, and interest in, the lands. In *Crooks Creek Commune,* 10 IBLA 243 (1973), the Interior Board of Land Appeals recognized standing of a commune consisting of some ten people to appeal the proposed logging of lands adjacent to their property, despite the fact that the Commune asserted no legal interest in such lands and despite uncertainty as to the group's legal status as an entity.

It must also be remembered that the "injury in fact" test imposed by the courts is itself a liberal standard. Denial of standing to the Sierra Club in *Sierra Club* v. *Morton,* 31 L Ed 2d 636, was based on the Club's failure even to allege that it or its members would be affected by the action complained of, rather than on the type of harm alledged. And in *U.S.* v. *SCRAP,* 37 L Ed 2d 254 (1973), the court deemed plaintiffs to have alleged perceptible harm based on allegations that their use of natural resources in Washington, D.C. area would be disturbed by the adverse environmental effects of nonuse of recyclable goods, which plaintiffs asserted would result from a railroad freight surcharge on such goods.

Appellant, State of Alaska, asserts certain rights to land selections under the Statehood Act, and alleges that such rights would be prejudiced by a determination of eligibility of the village of Solomon. (*Brief in Support of Appeal,* p.3; *Finding of Fact and Conclusions of Law,* p.2) The Board takes official notice of provisions for land selection by the State in Section 6(b) of the Alaska Statehood Act of July 7, 1958, 72 Stat. 339, 48 U.S.C. p. 11720 (1970).

Under section 11 of the Act, subject to certain exceptions, the lands in each township contiguous to and cornering on the township enclosing an approved Native village are withdrawn from the public lands and made available for selection by such village.

The potential for conflict between land selections by the State and the village of Solomon establishes a nexus with the village sufficient to assure the presentation of factual evidence relevant to the village's eligibility. This conclusion is consistent with the Board's ruling on the State of Alaska's standing as a party appellant in the appeal on Manley Hot Springs. *Department of Natural Resources, State of Alaska et al.,* v. *Village of Manley Hot Springs, et al,* ANCAB, VE 74-6, VE 74-15, VE 74-16 (June 10, 1974) at page 8.

Residence

Insofar as a major issue presented for decision in this appeal is whether or not the village of Solomon had 25 Native residents on April 1, 1970, and respondent has moved to exclude consideration of the question of residence of enrolled persons, it is appropriate to discuss the Board's jurisdiction to consider evidence on residence, and the Board's definition of residence within the contemplation of the Act and implementing regulations.

Board's Jurisdiction to Review Residence

The Board reaffirms its previous rulings on its jurisdiction to review the residence of enrolled Natives in *Department of Natural Resources, State of Alaska et al,* v. *Village of Manley Hot Springs, et al,* ANCAB, VE 74-6, VE 74-15, VE 74-16 (June 10, 1974) at pages 14-19:

> As to the assertion that certain issues relating to enrollment are outside the Board's jurisdiction:
>
> (a) Enrollment for purposes of determining the status and eligibility of the individuals as Alaska Na-

tives is outside the jurisdiction of the Board, and the Board will not hear appeals from Decisions of the Enrollment Coordinator.

(b) The Enrollment Coordinator is not a necessary party before the Board because the only administrative determination properly appealed and within the Board's jurisdiction on this appeal is the Final Decision of the Area Director on the eligibility of the village.

(c) The regulations in 43 CFR § 2651.2(b)(1) provide for an investigation and examination by the Area Director of "available records and evidence that may have a bearing on the character of the village and its eligibility."

(d) The regulations in 43 CFR §2651.2(b)(1) direct the Area Director to consider the residence of Natives "properly" enrolled to the village as shown on the roll, but also direct the Area Director to consider the census and other evidence.

(e) Since the regulations thus recognize that the determinations of village eligibility and enrollment are separate decisions, made by separate officers, under separate procedures, this Board has jurisdiction to review the final decision of the Area Director on the eligibility of the village . . . but is not required to review the enrollment of the individuals as determined by the Enrollment Coordinator.

Therefore, in deciding appeals from the Area Director's decisions on village eligibility, where the question of whether a village has the requisite minimum of 25 Native residents, as set forth in 43 CFR § 2651.2 (b)(1), is in issue, the Board will consider evidence on such questions including, but not limited to, evidence of residence as shown on the roll.—Order Denying Motions to Dismiss, dated March 25, 1974.

This order constitutes a ruling by the Board that it does have jurisdiction to determine the residence of enrolled Natives in connection with the determination of village eligibility.

Basis of Jurisdiction on Residence

This decision is based on construction of the Act and applicable regulations.

Section 5(a):

> The Secretary shall prepare within two years from the date of enactment of this Act a roll of all Natives who were born on or before, and who are living on, the date of the enactment of this Act. *Any decision of the Secretary regarding eligibility for enrollment* shall be final. (Emphasis added)

The finality of the Secretary's decision goes to eligibility, i.e., determination of sufficient blood quantum for individual placement on the Roll.

Section 5(b):

> The roll prepared by the Secretary *shall show* for each Native, among other things, the region and the village or other place in which he resided on the date of the 1970 census enumeration, and he shall be enrolled according to such residence. (Emphasis added)

There is no inference of finality of decision insofar as the residence of individuals on the roll is concerned, according to the language in the Act. However, the language "shall show" establishes a strong presumption of the correctness of the residency shown on the Roll. To interpret otherwise would lead to the conclusion that the Roll, insofar as it presumes to establish residence, is a futile endeavor.

Finally, the Roll signed by the Bureau of Indian Affairs Enrollment Coordinator and approved by the Secretary on December 17, 1973, certifies only that persons listed on the Roll were determined to be eligible for enrollment as Alaska Natives.

> Upon completion, the Coordinator shall affix to the Roll a certificate indicating that to the best of his knowledge and belief the Roll contains only the names of persons who were determined to meet the requirements for enrollment as Alaska Natives. The Roll shall be submitted to the Secretary for approval. (25 CFR 43h.9)

The differing language of the statute regarding eligibility and residency on the roll reflects a unique Indian enrollment required by the Alaska Native Claims Settlement Act. Since the settlement involves both land and money entitlements, and since these settlement entitlements accrue, in most part, (exceptions in § 14(h)) to regional and village corporations and enrollee-stockholders of these corporations, the roll had first to establish who was eligible to participate in the benefits of the settlement—i.e., who was an Alaskan Native. Second, the roll had to provide the basis for determining the kinds of benefits an individual would receive—i.e., whether as a stockholder of a village corporation and/or, a stockholder of a regional corporation. Third, the roll had to provide, on the basis of an individual's claimed residence, information as to the proportional amount of land and money entitlements the village and regional corporations will receive insofar as these are based on population.

Certification of the roll with a final determination as to eligibility of Natives and a showing of residency to determine individual benefits and assignment of proportional money and land entitlements to the village and regional corporations occur, under the timetable in the Act, prior to a determination of village eligibility.

Determination of village eligibility, under the Act and regulations, occurs after completion of the roll, but nevertheless requires a second round of fact finding.

Section 3(c):

> "Native village" means any tribe, band, clan, group, village, community, or association in Alaska listed in Sections 11 and 16 of this Act, or which meets the requirements of this Act, and *which the Secretary determines* was on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, *who shall make findings of fact in each instance*), composed of twenty-five or more Natives. . . . (Emphasis added)

The determination by the Secretary as to what qualifies as a Native village must be based on findings of fact, according to the language of the statute.

Section 11(b)(2):

> Within two and one-half years from the date of enactment of this Act, the Secretary *shall review* all of the villages listed in subsection (b)(1) hereof, and a village shall not be eligible for land benefits under subsections 14(a) and (b), and any withdrawal for such villages shall expire *if the Secretary determines that*—
>
> (A) less than twenty-five Natives were residents of the village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; or,
>
> (B) the village is of a modern and urban character and the majority of the residents are non-Native. (Emphasis added)

Section 11(b)(3):

> Native villages not listed in subsection (b)(1) hereof shall be eligible for land and benefits under this Act and lands shall be withdrawn pursuant to this section *if the Secretary* within two and one-half years from the date of enactment of this Act, *determines* that—
>
> (A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and
>
> (B) the village is not of a modern and urban character, and a majority of the residents are Natives. (emphasis added)

The statutory language mandates a Secretarial review and fact-finding before final determination of the eligibility of a village, and the mandate is inclusive as to the requirements for eligibility—25 residents of a village on April 1, 1970, and that the village not be of a modern and urban character.

Again, under the timetables in the Act, decisions as to eligibility and a showing of residency occur first: "The Secretary shall prepare *within two years* from the date of enactment of this Act, a roll. . . ." § 5(a) (emphasis added). "*Within two and one-half years* from the date of enactment of this Act, the Secretary shall review all of the villages. . ." § 11(b)(2) and (3). (Emphasis added)

Instead, Congress mandated that the Secretary, with the roll completed and information on it available to him, make a review and finding of fact on every village to determine whether it was, on the April 1, 1970 census date, composed of 25 Native residents and was not modern and urban in character.

Because the compilation and certification of the roll precedes in time the determinations of village eligibility, Con-

gress had the opportunity to require that residency as indicated on the roll was to be conclusive for the purposes of determining village eligibility. The fact that Congress did not so provide indicated that Congress did not intend for the residency as indicated on the roll to be conclusive for such purposes.

If the residence as shown on the roll is, as Respondents argue, conclusive on the issue of the residence of enrolled Natives, there would be no need to make a review and findings of fact in the determination of 25 residents.

Interior Department regulations affecting Native land selection reflect compliance with the Congressional fact-finding and review mandate in 43 CFR Part 2650.

§ 2651.2(a):

> Pursuant to Sections 11(b) and 16(a) of the Act, the Director, Juneau Area Office, Bureau of Indian Affairs, shall review and make a determination not later than December 19, 1973, as to which villages are eligible for benefits under the Act.

The parts following provide regulations for such determinations, including appeal procedures to this Board.

The residence criteria pertaining to village eligibility are contained in § 2651.2(b)(1):

> There must be twenty-five or more Native residents of the village on April 1, 1970, as shown by the census or other evidence satisfactory to the Secretary. A Native properly enrolled to the village shall be deemed a resident of the village.

If this paragraph contained only the first sentence, there would be clearly no question regarding the Board's jurisdiction to review the issue of residence. It is the second sentence which has been asserted as a conclusive presump-

tion in favor of residence as determined by the Enrollment Coordinator. However, this contruction renders the word "properly," superfluous in the sentence. Reading the sentence with the word "properly," however, seems to conflict with the phrase "shall be deemed," since a Native "resident" of a village is necessarily "properly enrolled" to the village. Giving effect to both the word "properly" and the phrase "shall be deemed" in the sentence clearly creates a rebuttable presumption that a Native who is enrolled to a village is a resident of that village.

This construction is consistent with other rebuttable presumptions normally used by courts and administrative agencies, such as the presumption that public officials have performed their duty in the proper manner, and the presumption that a person's statements on an official government form are true and accurate to the best of his knowledge and belief.

This rebuttable presumption was adopted by the Board for all village eligibility appeals concerning villages listed in section 11(b)(1) of the Act. *Department of Natural Resources, State of Alaska, et al,* v. *Village of Manley Hot Springs, et al,* ANCAB, VE 74-6, VE 74-15, VE 74-16 (June 10, 1974).

> b. Persons who appear on the Roll of Alaska Natives as residents of a named village are rebuttably presumed to be residents of the village named for purposes of village eligibility determination.—*Manley Hot Springs,* supra, at page 19 (1974).

The rebuttable presumption is consistent with Section 5(b) of the Act.

Therefore, the Board concludes that it has jurisdiction to review the residence of individuals enrolled as Alaska Natives for purposes of village eligibility determinations. The Board also rules that it does not have jurisdiction to review the determination of the Enrollment Coordinator,

that a person meets the requirements for enrollment as an Alaska Native, since such determinations have been vested in the Enrollment Coordinator and the Regional Solicitor by regulations in 25 CFR Part 43h, subject only to the approval of the Secretary, pursuant to 25 CFR 43h.9. The Board takes official notice that persons listed as eligible on the Roll of Alaska Natives approved by the Secretary are "Natives" within the meaning of the Act and regulations.

Definition of Permanent Residence

For determinations of village eligibility, the Board adopts the same definition of residence used by the Enrollment Coordinator, contained in 25 CFR 43h.1(k):

> "Permanent residence" means the place of domicile on April 1, 1970, which is the location of the permanent place of abode intended by the applicant to be his actual home. It is the center of the Native family life of the applicant to which he has the intent to return when absent from that place. A region or village may be the permanent residence of an applicant on April 1, 1970, even though he was not actually living there on that date, if he has continued to intend that place to be his home.

It is helpful to compare this definition of permanent residence with the concept of "home," defined in the *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 12, (1971) as "the place where a person dwells and which is the center of his domestic, social, and civil life." The comments indicated that when determining whether a place is a person's home, consideration should be given to its physical characteristics, the time one spends there, the things one does there, his intention when absent to return to that place, other dwelling places of the person and similar factors concerning those other dwelling places of the

person and similar factors concerning those other dwelling places. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 12, Comment C at 50 (1971).

Other factors in the definition in 25 CFR 43h.1(k) recognize the special situation of Alaska Natives, where Native family life may be characterized by patterns of kinship and activities substantially different from non-Native family life. In addition, the definition recognizes the frequently transient life style of Alaska Natives. Thus, the definition emphasizes the factors of Native family life and intent to return.

While intent is obviously subjective and personal, it is frequently capable of objective proof, and where objective evidence is presented which contradicts subjective intent, and the objective evidence is neither rebutted nor explained, it will clearly be persuasive. On the other hand, where economic, educational, or other requirements have temporarily deprived one of any real choice, and both the subjective intent and the objective evidence indicate a genuine connection with the place of enrollment, that place is considered to be the permanent residence of the individual within the meaning of 25 CFR 43h.1(k), notwithstanding that for other purposes a court or an administrative agency may find that person's residence or domicile to be some place other than his "permanent residence" as determined for purposes of the Alaska Native Claims Settlement Act.

The Respondents have cited a letter from Curt Berklund, Deputy Assistant Secretary of the Interior, dated February 27, 1973, to Morris Thompson, Area Director, Bureau of Indian Affairs, Juneau, Alaska, which interprets the definition of "permanent residence" in 25 CFR 43h.1(k). The pertinent paragraph in the letter reads:

> The primary point of confusion is who now living out-of-state enrolls back to Alaska. *Under the above definition a person who has at one time lived in a village or other place in Alaska and considered that place to be his permanent residence on April 1, 1970, and intends to return to that place must enter that place in column 16 on the application form and be enrolled there.* If he considered some place outside of Alaska as his permanent residence on April 1, 1970, and intends to return there, he *must* enter that place in column 16. *There is no "choice" involved. Under no circumstances* may an individual who has never lived in *Alaska enroll to a village in Alaska through personal choice* by entering a village name in column 16 on the application form. The only way in which a person who has never lived in Alaska may be enrolled in Alaska would be by (1) showing an out-of-state permanent residence in column 16 of the application form and (2) voting "No" on the establishment of a 13th regional corporation. He would then be enrolled by the Secretary in one of the twelve regions in Alaska based upon the priorities listed in Section 5(c) of the Act. (emphasis in original)

Considered in the context of the enrollment regulations in 25 CFR 43h, and with particular reference to the problem addressed by this letter—that is, the enrollment of persons who are residents outside the state of Alaska—the letter is not inconsistent with the interpretation of "permanent residence" adopted by the Board; but neither is it particularly relevant to the problem of how the place of "permanent residence" should be determined. There is no disagreement with the proposition that one should be enrolled to his "permanent residence."

Discussion

The Board, having reviewed the entire record in this appeal, finds that the Judge made proper findings of fact and conclusions of law; and adopts and incorporates the Recommended Decision of the Judge set forth in the Ap-

pendix hereto, with the preceding discussion of certain issues involved in this appeal. The Board's elaboration of its position on these issues does not alter or affect the findings of fact or conclusions of law reached by the Judge.

The proposed findings of fact and conclusions of law submitted by the parties have been considered and, except to the extent they have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are in whole or in part, contrary to the facts or because they are not relevant to the rulings that have been made. *United States* v. *Merle I. Zweifel*, 80 I.D. 323 (1973).

Except to the extent that this decision reflects a favorable disposition all pending motions are denied.

Decision

Pursuant to Section 11(b)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(b)(3) (Supp. II, 1972), the unlisted village of Solomon is hereby certified as *not* eligible for benefits under Section 14(a) 43 U.S.C. § 1613 (a) (Supp. II, 1972), of the Act.

This represents a unanimous decision of the Board.

DATED this 16th day of September, 1974, at Anchorage, Alaska.

Alaska Native Claims Appeal Board

/s/ JUDITH M. BRADY
Judith M. Brady, Chairman
/s/ ALBERT P. ADAMS
Albert P. Adams, Board Member
/s/ ABIGAIL F. DUNNING
Abigail F. Dunning, Board Member
/s/ JOHN A. WALLER
John A. Waller, Board Member

APPROVED:

Secretary of the Interior

APPENDIX M

UNITED STATES DEPARTMENT OF THE INTERIOR
ALASKA NATIVE CLAIMS APPEAL BOARD

P. O. Box 2433
Anchorage, Alaska 99510

BUREAU OF SPORT FISHERIES & WILDLIFE, *Appellant*

v.

VILLAGE OF SALAMATOFF, COOK INLET REGION, INC., and BUREAU OF INDIAN AFFAIRS, *Respondent*

ANCAB #VE 74-12

Involving the eligibility of the Village of Salamatoff under the Alaska Native Claims Settlement Act

DECISION

Preface

This is a decision on the eligibility of the village of Salamatoff, Alaska, for status as a Native village under the Alaska Native Claims Settlement Act of December 18, 1971, 85 Stat. 688, 43 U.S.C., Sec 1601 et seq., hereinafter referred to as the Act, and the Secretary of the Interior's Rules and Regulations on Alaska Native Selections, 43 CFR, 2650, *et seq.* Status as a village confers certain statutory benefits under the Act, including the right to select substantial quantities of land and receive patent conferring the surface rights associated with it. Subsurface rights to village lands may be patented to the regional corporation for the region in which the village is located.

The Act in Section 3(c) defines the term "Native village" as "any tribe, band, clan, group, village, community, or association in Alaska listed in sections 11 and 16 of the Act, or which meets the requirements of this Act, and which the Secretary determines was, on the 1970 census

enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives."

Statutory criteria for village eligibility are contained in Section 11(b)(2) of the Act, which provides:

> Within two and one-half years from the date of enactment of this Act, the Secretary shall review all of the villages listed in subsection (b)(1) hereof, and a village shall not be eligible for land benefits under subsections 14(a) and (b), and any withdrawal for such village shall expire, if the Secretary determines that—
>
> (A) less than twenty-five Natives were residents of the village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; or,
>
> (B) the village is of a modern and urban character, and the majority of the residents are non-Native.

Implementing regulations in 43 CFR 2651.2(b) provide:

(1) There must be 25 or more Native residents of the village on April 1, 1970, as shown by the census or other evidence satisfactory to the Secretary. A Native properly enrolled to the village shall be deemed a resident of the village.

(2) The village shall have had on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style and at least 13 persons who enrolled thereto must have used the village during 1970 as a place

where they actually lived for a period of time; *Provided,* that no village which is known as a traditional village shall be disqualified if it meets the other criteria specified in this subsection by reason of having been temporarily unoccupied in 1970 because of an Act of God or government authority occurring within the preceding 10 years.

(3) The village must not be modern and urban in character. A village shall be considered to be of modern and urban character if the Secretary determines that it possessed all of the following attributes as of April 1, 1970:

(i) Population over 600.

(ii) A centralized water system and sewage system that serves a majority of the residents.

(iii) Five or more business establishments which provide goods or services such as transient accommodations or eating establishments, specialty retail stores, plumbing and electrical services, etc.

(iv) Organized police and fire protection.

(v) Resident medical and dental services, other than those provided by Indian Health Service.

(vi) Improved streets and sidewalks maintained on a year-round basis.

(4) In the case of unlisted villages, a majority of the residents must be Native, but in the case of villages listed in sections 11 and 16 of the Act, a majority of the residents must be Native only if the determination is made that the village is modern and urban pursuant to subparagraph (3) of this paragraph.

Regulations in 43 CFR 2651.2(a) establish a procedure for determining whether a village meets the above criteria

for eligibility. The determination is made by the Director Juneau Area Office, Bureau of Indian Affairs, by a process involving publication of a proposed decision, subject to protest by interested parties; consideration of protests; and publication of a final decision on village eligibility which may be appealed to the Secretary. Appeals to the Secretary are made to an ad hoc board which he has personally appointed, at least one member of which must be familiar with Native village life. Appeals to the Board are governed by applicable regulations in 43 CFR 4.700-4.704.

> 43 CFR 4.704, as amended January 21, 1974 (39 F.R. 2366) provides:
>
> Any hearing on such appeals shall be conducted by the Ad Hoc Appeals Board or a member or members thereof, or by an Administrative Law Judge of the Office of Hearings and Appeals and shall be governed insofar as practicable by the regulations applicable to other hearings under this part.

The Ad Hoc Appeals Board has subsequently been designated the Alaska Native Claims Appeal Board and will hereinafter be referred to as the Board.

The Village of Salamatoff is listed in Section 11(b)(1) of the Act, and was found eligible by the Director, Juneau Area Office, Bureau of Indian Affairs in a decision published in the Federal Register on December 12, 1973 (38 FR 34212).

The decision was appealed by the Bureau of Sports Fisheries and Wildlife, hereinafter referred to as the Appellant, on January 11, 1974. The Bureau of Indian Affairs, the Village of Salamatoff, and the Regional Corporation of Cook Inlet Region, Inc., responded to the appeal. Following receipt and consideration of briefs and motions and issuance of certain preliminary rulings, the Board directed that a de novo hearing be conducted on May 13, 1974 in

Kenai, Alaska, by an Administrative Law Judge. All parties appeared by counsel and were given the opportunity to present oral argument and evidence, to cross-examine opposing witnesses, and to submit proposed findings of fact and conclusions of law after receipt of the hearing transcript. The record compiled in this proceeding and now before the Board consists of the BIA case file; the Board's file containing the Notice of Appeal, pleadings, briefs, and motions and preliminary rulings thereon by the Board; exhibits submitted by the parties and admitted into evidence at the hearing; the hearing transcript; proposed findings of fact and conclusions of law submitted by the parties; and a recommended decision submitted by the Administrative Law Judge to the Board. It is on this record taken as a whole that the Board reaches its decision.

Decision of Administrative Law Judge

The Administrative Law Judge, in his recommended decision, made the following findings and conclusions:

(1) the issues presented in the appeal are:

> (a) Whether Salamatoff on April 1, 1970 had and identifiable physical location evidenced by occupancy consistent with the Natives own cultural patterns and life style. [and]
>
> (b) Whether at least 13 persons who enrolled to Salamatoff used the village during 1970 as a place where they actually lived for a period of time.—Administrative Law Judge's (ALJ's) Recommended Decision, p. 2.

(2) the Bureau of Sport Fisheries and Wildlife has standing to appeal the determination of the Director, Juneau Area Office, Bureau of Indian Affairs, on the eligibility of the village of Salamatoff.—ALJ's Recommended Decision, p. 3.

(3) in view of the conclusion in paragraph (8), below, "there is no requirement for a ruling on the residency question posed by the B.I.A."—ALJ's Recommended Decision, p. 4.

(4) 43 U.S.C. Section 1602(c) provides that "Native village means any tribe, band, clan, group, village, community, or association in Alaska."—ALJ's Recommended Decision, p. 4.

(5) "the Salamatoff Natives are not a tribe or a band."—ALJ's Recommended Decision, p. 5.

(6) the Salamatoff Natives are "a community or group of the type constituting a Native village within the meaning of the Act."—ALJ's Recommended Decision, p. 17.

(7) "the area between Salamatoff 1, just north of the mouth of Salamatoff Creek, and Salamatoff 2, the site of George Miller's homestead, was on April 1, 1970, the Native Village of Salamatoff."—ALJ's Recommended Decision, p. 17.

(8) "32 Natives enrolled to the Village of Salamatoff were physically present and permanently residing within the village of Salamatoff on April 1, 1970."—ALJ's Recommended Decision, p. 17.

Decision of the Alaska Native Claims Appeal Board

After extensive consideration of the Administrative Law Judge's recommended decision, the transcript of the hearings, the documentary evidence submitted at the hearing as exhibits, and the arguments of the parties contained in their briefs, the Board has concluded:

(1) Salamatoff was not a "Native village" within the meaning of the Act on April 1, 1970; and

(2) Salamatoff did not have on April 1, 1970 an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style.

Since these conclusions differ from the findings and conclusions of the Administrative Law Judge, a discussion of the evidence is in order.

Before, entering upon a review of the testimony, however, a discussion of the legal issues involved will be helpful.

Standing

Appellant's standing is challenged on the grounds that they cannot be a "party aggrieved" within the meaning of 43 CFR 4.700 because, as a Government agency, they are not eligible for status as a party and because they have failed to assert a real injury.

The Board is unable to accept the general proposition that agencies of a Department do not have the capacity to appeal decisions of other agencies within the same Department to the head of that Department. In *Margaret Chicharello*, 9 IBLA 124 (1972), the Interior Board of Land Appeals ruled that the Bureau of Indian Affairs had standing, in its official capacity, to appeal a decision of the New Mexico State Director, Bureau of Land Management, disposing of lands under the Public Sale Act, 43 U.S.C. 1171 (1970), and the Recreation and Public Purposes Act, 43 U.S.C. 869 (1970).

Neither the Act nor its legislative history can be construed as affirmatively prohibiting the recognition in the proper circumstances, of an agency as an aggrieved party. The fact that Congress made no express provision for the formal participation of the Bureau of Sports Fisheries and Wildlife in the determination of village eligibility cannot be read as a constructive denial of standing.

Except for Section 2(b) of the Act which states "the settlement should be accomplished rapidly . . . with maxi-

mum participation by Natives in decisions affecting their rights and property . . .", the Act does not expressly contemplate participation by parties other than the Secretary in the determination of village eligibility. A logical result of respondents' argument would be that no one could appeal a decision certifying a village as eligible since Congress had not specifically provided. The Board rejects this argument.

Respondents' contention, that Appellant lacks standing as an aggrieved party because of a failure to assert sufficient injury, must be examined carefully. It is helpful to review the rationale and development of the concept of standing.

The requirement of standing dictates that each party to litigation should have some interest therein, and operates to protect both individual parties, and the judicial process. This requirement recognizes that it is intrinsically unfair to expose an individual party to the trouble and expense of a frivolous suit, instigated by an opposing party who has suffered no real harm from the actions of the defendant. It also recognizes the reliance of the court, in the adversary system, on the ability of the parties before it to present relevant evidence. The issue of standing focuses on the party seeking to get his complaint before the court, to ascertain that he has such a personal stake in the outcome as to assure the "concrete adverseness" which sharpens the presentation of issues on which the court depends. *Flast* v. *Cohen,* 20 L Ed 2d 947 (1968); *Baker* v. *Carr,* 7 L Ed 2d 663 (1962).

Pursuing this concept, the courts have developed a dual test of standing; to have standing, a party must allege injury in fact, to an interest within a zone of interest protected by the statute or constitutional guarantee invoked. *Association of Data Processing Service Organizations* v. *Camp,* 25 L Ed 2d 184 (1970); *Barlow* v. *Collins,* 25 L Ed 2d 192 (1970). Not only must the injury alleged be to a

cognizable interest, but the party alleging it must himself be among the injured. *Sierra Club* v. *Morton,* 31 L Ed 2d 636. The injury must be real, not remote or speculative; a plaintiff must allege "that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." *U.S.* v. *SCRAP,* 37 L Ed 2d 254 (1973).

It is recognized, as argued by the Respondents, that courts have applied these tests to determine the standing of litigants before them. However, it must also be remembered that the Board is an administrative body, not a court.

The Board acts in this proceeding for the Secretary, who has been directed by Congress in Section 11(b)(2) of the Act to determine village eligibility through consideration of census data or other evidence, and to "make findings of fact in each instance."

Part of this statutory fact-finding responsibility has been delegated to the Director, Juneau Area Office, of the Bureau of Indian Affairs in that it is his duty under regulations in 43 CFR 2651.2 to investigate the villages listed in the Act and publish decisions on their eligibility. It is these decisions which are appealed to this Board, and it is the Board's duty to decide, subject to the approval of the Secretary, whether these decisions were correct.

In carrying out this duty, delegated to it by the Secretary, the Board is authorized, in its discretion, to direct hearings. (43 CFR 2651.2(a)(5); 43 CFR 4.704).

It is clearly the purpose of such hearings to enable the Secretary, through the Board, to fulfill his statutory obligation of deciding village eligibility appeals with the fullest possible command of the relevant facts.

This purpose is best served by recognizing standing of a party who demonstrates a nexus with the village sufficient to assure the presentation of factual evidence relevant to the village's eligibility.

Cook Inlet Region, Inc., and Village of Salamatoff challenged BSF&W's standing to appeal to the Board, arguing that BSF&W was not an interested or aggrieved party. In support of the motion to dismiss, appellees contend that Congress has empowered the Secretary of the Interior to protect the purposes of a Wildlife Refuge notwithstanding the selection of refuge lands (surface rights) by a village corporation; in addition, the laws and regulations governing the use and development of the refuge are to remain applicable to selected lands lying within refuge boundaries. Such regulations will permit uses by the acquiring corporation "that will not materially impair the values for which the refuge was established." 43 CFR 2650.4-6. The assumption that there are no circumstances in which management could be prejudiced if such a selection is made is not warranted. It is questionable whether the radically opposed programs and purposes of the two land uses can be adjusted by the mere issuance of regulations. Insuring that Refuge "values are not materially impaired is by no means the equivalent of guaranteeing that operation and maintenance of the Refuge will suffer no impairment or detriment. The Board concludes that the Bureau of Sports Fisheries and Wildlife has standing.

Exceptions

Respondents have moved that they be given an opportunity to submit exceptions to the recommended decision issued by the Board. The fact that respondents were afforded opportunity to submit proposed findings and conclusions to the Administrative Law Judge prior to the issuance of his decision satisfied the requirement that each party prior to final decision shall be afforded reasonable

opportunity to submit proposed findings and conclusions or exceptions to the decision or recommended decision of subordinate officers. *Watson Bros. Transportation Co.* v. *United States,* 180 F. Supp. 732.

The Board therefore denies such motion.

Construction of the Act

Respondents have argued that the Act must be liberally construed in favor of the Natives wherever any ambiguity exists in the statutory language. The cases cited on this point, however, are dealing specifically with the "traditional guardian-ward relationship between the United States and the Indians" which has been the relationship between the Federal Government and the Native people in the lower 48. *Squire* v. *Capoeman,* 351 U.S. 1; *Carpenter* v. *Shaw,* 280 U.S. 363. As is emphasized time and time again in the legislative history of the Act, Congress intended this legislation to be "a more just and, hopefully, a wiser solution than has been typical of our country's history in dealing with Native people in other times and in other states. R. Rep. No. 405, 92d Cong., 1st Sess. 61-62 (1971). The Act "intends to avoid prolonged legal or property distinctions or implications of wardship based upon race." Id. at 80.

Further, in the specific cases involving village eligibility appeals, the legal doctrine of liberal statutory construction in favor of Indians loses its meaning because of Section 12(b) in the Act:

> The difference between twenty-two million acres and the total acreage selected by Village Corporations pursuant to subsection (a) shall be allocated by the Secretary among the eleven Regional Corporations (which excludes the Regional Corporation for Southeastern Alaska) on the basis of the number of Natives enrolled in each region. Each Regional Corporation shall re-

allocate such acreage among the Native villages within the region on an equitable basis after considering historic use, subsistence needs and population. The action of the Secretary or the Corporation shall not be subject to judicial review.

The twenty-two million acres set aside in the Act for eligible Native villages is a total figure that can go only to villages, regardless of the number of villages that qualify.

If an unqualified village is certified, it receives land benefits at the expense of those properly certified Native villages and thus deprives other Native stockholders of land benefits to which they would otherwise be entitled.

DISCUSSION

The official enrollment submitted by the Bureau of Indian Affairs, as exhibit 201, shows 126 Natives enrolled to Salamatoff. Approximately 50 of these enrollees show Eskimo and Aleut, but no "Indian" blood quantum, and would normally not be included in a Tanaina Indian community, such as are found on the Kenai Peninsula. Their enrollment to Salamatoff is not explained.

According to the USGS maps submitted as exhibits 2, 3, 4, and 5, and the maps attached to exhibit 1, which had been previously submitted to the Board as an attachment to one of respondents' briefs, there are two lakes, a creek, and a beach several miles long all of which bear the Salamatoff name.

No one asserts that more than 35 to 40 Natives lived in the Salamatoff beach area claimed as the village site.

In the absence of any explanation it can only be inferred that persons enrolled to Salamatoff because it was a name known to represent a general geographical area on the North Kenai Peninsula, and it was listed as a village in section 11(b) of the Act.

It is noted, however, that only 25 Native residents are required on April 1, 1970, for there to be an eligible village under the Act and regulations. § 11(b)(2), 16 USC 1610 (b)(2); 43 CFR 2651.2(b)(1) [sic].

Turning our attention to the Natives identified within the Salamatoff beach area, the Board agrees with the Administrative Law Judge's finding and conclusion numbered (5) above, that "the Salamatoff Natives are not a tribe or a band."

The definitions of tribe and band in *Montoya* v. *United States*, 180 U.S. 261 (1901), emphasizing the requirement of leadership, lead to the conclusion that the Salamatoff Natives are not a tribe or a band. Also, the Alaska Reorganization Act of May 1, 1936, which extended the provisions of the I.R.A. to the territory of Alaska, recognized that most of the natives of Alaska did not live on reservations and were not grouped as bands or tribes as in the States. Section 1 provided that:

> * * * groups of Indians in Alaska not heretofore recognized as bands, tribes, *but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district,* may organize to adopt constitutions and bylaws to receive charters of incorporation and Federal loans under section 16, 17, and 10 of the Act of June 18, 1934 (48 Stat. 984). (Emphasis added.)

In fact, the Administrative Law Judge relied upon the more general term, community, in his decision.

The following definition is from 15(A) CJS 89 titled *Community*:

> The word community is a flexible term, taking color from the context in which it appears. In its broadest and most general sense it may signify common character or likeness, or it may mean living in a common

home or house with some apparent association or interest.

"Community" is also defined as meaning the people who reside in a given locality in more or less proximity, and, as used in this sense to signify people rather than the territory which includes them, it is sometimes defined as meaning a city or township. However, in this ordinary or proper sense it does not signify township, or village, or other political subdivision, or even a section of a town, and is too indefinite to be used for purposes of exact measurement in terms of acreage or square miles. It does not connote a large geographical area with widely diversive interests.

A better and more generally accepted signification of the term is the number of people associated in the same locality having common interests or privileges and subject to the same laws and regulations; * * * a body of people having common rights, privileges, or interests, who are living in the same place and under the same laws and regulations, or having an association of interests of a common character or likeness.

The word "community" is further defined as meaning a territory having a common community center; an area in which there is a community of people or interests; such an area as is governed by the same laws, and the people are unified by the same sovereignty and customs * * *.—ALJ's Recommended Decision, p. 5.

In State of Arizona v. Downey, 430 P.2d 122 (1967), an area of 2.85 square miles was held to qualify as a community entitled to incorporation. The individuals in this area had similar business interests, professions, and occupations, and resided more or less in proximity. They had common interests in public health, fire protection and availability of water. The fact that some or all of such services were obtained from without the

area or were available to others who were without the area which was to be incorporated was found not to make the interests in such services any less common to people within the area. It is noteworthy that the area itself contained no business, industry, retail stores, professional or governmental offices, and did not have transportation facilities.

However, as will appear from the discussion of the evidence, there was very little sense of community amongst the people residing in the Salamatoff area 1970 which was any different from the sense of community of people in the general Kenai area. The case, *State of Arizona* vs. *Downey,* supra, relates to the law of municipal corporations in Arizona, and is not persuasive as to the situation of Natives in Alaska.

The term "group" as applied to Alaska Natives is defined in section 3(d) of the Act:

> "(d) 'Native group' means any tribe, band, clan, village, community or village association of Natives in Alaska composed of less than twenty-five Natives, who comprise a majority of the residents of the locality."

Since the use of the term "group" in the definition of "village" necessarily refers to a group of Natives, the Board concludes that the definition section 3(d) establishes the standard of reference, except for the number of Natives (less than 25) involved.

The conclusion that the Salamatoff Natives constitute a community or a group, is not supported by substantial evidence in the hearing record.

The Witnesses

Several witnesses who lived in the area and were familiar with it or had studied the area, and therefore were in

a position to know, were not aware of a Native Village in the area of Salamatoff.

Mary Willetts testified that she has been a resident of the Kenai area for sixteen years, was familiar with the north Kenai road area and had visited Native friends in the area of Salamatoff, but did not know of a Native village of Salamatoff. (Tr. 20-58)

Jack Lewis, owner of patented homestead on acreage identified as Salamatoff Village site on USGS maps, (BSF &W Exhibits #4&6) testified that he was a resident of the Salamatoff area since 1945 and he never knew anything of a village in the area of Salamatoff Creek. (Tr. 105-116)

Ole Frostead, owner of a homesite on acreage identified as Salamatoff Village site on USGS maps, (BSF&W Exhibit #4) testified that he was previously married to a sister of Rika Murphy, Doris Mann, deceased since 1935, this his present wife, Mary Frostead, and daughter are Natives enrolled to Salamatoff, that they built a cabin near Salamatoff Creek in 1942 and returns every summer to fish the area that he and his wife live in the winters in Bellingham, Washington and that there is no village of Salamatoff in the area so far as he knows. (Tr. 116-126)

Mr. James Arness testified that he had lived in the Salamatoff area for twenty-two years and fished the area, including the setnet site right next to Rika Murphy's in the 1950's, that he had never seen anything like a Salamatoff village in the area, and had never heard of a Salamatoff Native Association before April 1, 1970. He testified that he was the current President of the Kenai Peninsula Borough Assembly. (Tr. 126-134)

Margaret Mullen testified that she had homesteaded in the area with her husband in 1947, that there were no roads in the area at that time, that she had walked the Salamatoff beach area, visited friends there, and was familiar with the Salamatoff area, and that she had never heard of nor

seen anything of a Salamatoff village, a Salamatoff village association, or group, before the Act. She also testified that in 1947 was about the time of the influx of non-Native homesteaders, returning veterans, into the area; that when she first saw Kenai it was definitely a village consisting of both Natives and non-Natives, with homes relatively close together, activities centered around the Russian Orthodox Church. She testified that with the influx of newcomers and industry that the town of Kenai had spread out, people moving away from the concentrated downtown area to better homesites. (Tr. 134-150)

John Hakola testified that he was familiar with the area through having lived there and having done research for the Bureau of Sports Fisheries and Wildlife on the general history of the Kenai Moose Range, and that in his research, including materials from the 1880's forward, he had never encountered any reference to a village in the area of Salamatoff Creek. (Tr. 150-163)

Mr. Gail Fitzpatrick testified that he was the BIA investigator who prepared the field report on the "Village of Salamatoff". He testified that the area of the village which he visited consisted of approximately two and one-half to three miles along Salamatoff beach and from one-quarter to one-half mile deep consisting of houses on both sides of the north Kenai highway. Based upon information in the Alaska Dictionary of Place Names, Mr. Fitzpatrick testified that the village of Salamatoff had been in existence since the early 1900's. (Tr. 163-194)

> Salamatoff: locality, on E shore of Cook Inlet at mouth of Salamatoff Creek, 5.5 mi, NW of Kenai, Cook Inlet Low.; 60°37′15″N, 151°20′30″W; (map 62).
>
> Tanaina Indian village reported about 1911 by US GS (Martin and others, 1915, pl. 2). Recent USGS maps indicate an abandoned site.

Source: Dictionary of Alaska Place Names, Geological Survey Professional Paper 567, U.S. Government printing office 1969.

Bertha Monfor, a Native woman enrolled to Salamatoff testified that she lived in Kenai with her father where she grew up, that they fished the beach north of Salamatoff every summer until she was married. She describes the village of Kenai when she growing up, as a village with lots of people where the houses were fairly close together, there was a church and a school and a little store and people could walk easily from one house to another. Following the description she was asked, "Was there a village like that in Salamatoff Creek in that area in 1970?" She answered, "Not after I moved out here." (Tr. 247)

Although the record is scant to the extent that there is any explanation for the apparent lack of knowledge in the general community of the existence of a village of Salamatoff, that information comes from Rika Murphy, respondents' witness, who testified on cross-examination, that the old village of Salamatoff used to be located near Salamatoff Creek and was abandoned sometime prior to 1916 because of flu epidemic in the area (Tr. 290). This perhaps accounts for the reference to the Salamatoff site as "abandoned" on the 1944 USGS map (BSF&W Exhibit #2) and in the Dictionary of Alaska Place Names.

Apparently the village site remained abandoned. Rika Murphy refers to people going to the area to trap, hunt and fish after the fear of the flu epidemic was over (Tr. 290), and George Miller, President and Executive Director of the Kenai Natives Association, talked about people going to the area in the '30's and '40's to harvest hay as well as many other Natives who lived in Kenai going to the Salamatoff Beach area in the summertime to fish. Among the Natives identified by Mr. Miller as living in Kenai but fishing Salamatoff beach during the '40's before the roads

were built and the influx of non-Natives into the area are (1) Paul Wilson, not enrolled to Salamatoff, (2) Harry Mann, enrolled to Salamatoff, (3) George Hunter, enrolled to Salamatoff, (4) Rika Murphy, enrolled to Salamatoff, (5) Julius Juluison, not enrolled to Salamatoff, (6) Philip Wilson, not enrolled to Salamatoff, (7) Jim Wilson, not enrolled to Salamatoff, and his uncles (8) Nick Mishikoff and Nikita Mishikoff, residents of Kenai.

When ask what was in the area of Salamatoff in '45 to . . . , he testified:

> "A. Well, there was some settlements—not settlements, but groups of people living all the way from Salamato Creek north. In fact, a few on the south. Munfors, the Kalifonsky's, the Sunrises, all those people lived there and lived along that coast.
>
> Q. Were there any roads?
>
> A. Yes, there was a road—a wagon trail from what they call the Refinery Area today, to Kenai. In fact, it's still—if you look carefully, you'll still find the wagon trail that the Headberg family, the original homesteader up in that area, a Native family, commuted back to Kenai for groceries. That's where they lived." (Tr. 203)

In further testimany, Mr. Miller identifies the Bactuits as a Native family from the area who also used the road. The Bactuit, Headberg, and Sunrise family names do not appear on the Salamatoff enrollment. In other testimony, the Kalifonskys are identified as still living in Kenai during this period (see Fedosia Sacaloff's testimony, below). The Munfors may well have lived on the beach during this time, however. (See Bertha Munfor's testimony, below).

Mr. Miller testified that he and Ted Mining built the first Jeep road into the area in approximately 1950, and that the new highway into north Kenai was built after 1952.

(Tr. 198-206) He also testified that he first homesteaded in the area of Salamatoff 2, marked with a number 2 on BSF&W Exhibit 5, in 1950, received title to his homestead in 1962, and that subsequent to his homesteading in the area of Salamatoff 2, several of his friends and relatives moved on to the property with him. Mr. Miller testified that there was a little subsistance fishing along the beaches until the '60's when the fish became commercially valuable and that now the fish sites are predominately white owned. He testified that most of the people in the Salamatoff area had been living there for around 15 years, i.e. 1959-1960, and that up to 10 years ago the area was fairly heavily populated with non-Natives but as the oil industry curtailed its operations in the vicinity, the non-Natives left the area. Mr. Miller is enrolled in Kenai. (Tr. 194-226)

Fedosia Sacaloff testified that she was the daughter of Nick Kalifonsky, grew up in Kenai, used to go from Kenai to Salamatoff area to fish every summer before about 1952, when she married and moved with Nick Sacaloff to a homestead near Salamatoff. During the time that they lived on their homestead, she would visit with the other people in the area, visited with the Munfors "of and on" (Tr. 235) and that she "knew" Rika Murphy and Harry Mann. She testified that she had five children who were residing with her in 1970. (Tr. 226-235)

Bertha Munfor testified that she was born in English Bay and grew up in Kenai where she lived with her father, that they would go in the summer time from Kenai to the Salmatoff area to fish the beach and then return to Kenai for the winter. She testified that she moved to the beach area in 1942 and lived there until 1952 (Tr. 240) but appears to be confused as to the dates because she also testified that she was married to Theodore Mamaloff and lived with him in Kenai until his death approximately ten years ago. (Tr. 236-248)

Harry Mann testified that lots of Natives fished the Salamatoff beach over the years from 1935 to 1960 while he was fishing the beach, and that his home was in Kenai until 1966 when he purchased an acre of land from George Miller's homestead, where he lived until 1972 and then moved to Kasilof. He testified that he was the President of Kenai Indians as recently as 1967, but that he is now a member of the Salamatoff village counsel. The Natives identified by Mr. Mann, who used to fish in Salamatoff area, include (1) Paul Wilson, not enrolled to Salamato (2) Nikita Michikoff resident of Kenai, (3) Nick Kalifonsky, resident of Kenai, and (3) the Saclaoffs, all of whom are identified as living in Kenai until the 1950's. He also testified that his sister, Rika Murphy, was the first President of the Kenaitze Tribe, in the late '60's. (Tr. 249-278).

Rika Murphy testified that she is the sister of Harry Mann and that she grew up in Kenai where her family lived. She also testified that her father had fish sites at the Nikishkia Dock area and also on the Kalifonsky Beach and that she and her family fished during the summer time all the way from the Nikishkia Docks down to the Kalifonsky Beach areas. She testified that she did not recall whether her father ever fished at Salamatoff beach area. She married George Hunter in 1935 and had four children by him, only two of whom are enrolled to Salamatoff. She identified the family tree chart (Salamatoff Exhibit D) and said that it was incomplete, that it showed only the members of her family who are enrolled to Salamatoff and not others enrolled to Kenai. In 1949 she came with her husband and children to Kenai from Anchorage and could find no place to live and so moved to the Salamtoff area to a shack and has been there ever since. She testified that she goes to church with some regularity in Kenai, as do the other people from the Salamatoff area and that on important occasions there is a general get-together which includes the people of Salamatoff. She testified that there was some attempt to organize in connection with Native allotments prior

to 1970 and that there were a number of Native homesteaders in the Salamatoff area as well as scattered all over the north Kenai area and also a number of non-Native homesteads in the area. She also testified that the Natives and non-Natives were generally friendly in the area and that the non-Native homesteaders would come and use her bonya and they would get together for spagetti dinners and such. She identified the area shown on BSF&W Exhibit 5, as the general area claimed as the village of Salamatoff. (Tr. 278-309)

When describing the efforts to form an association prior to 1970, however, she says:

> "Well we were trying to organize so we could—we had all filed our Native allotments, and we thought that by sticking together, we would be able to—to help each other than by separating and going our own way. And that was the main reason we were trying to organize and get established, ***" (Tr. 287)

And a little later this exchange takes place between the attorney for the village of Salamatoff and Mrs. Murphy:

> "Question—Is Salamatoff an important place to you? Answer—Yes it is. Question—Why is it important to you? Answer—Well, that is where I started learning about the land claims, I guess, and it's a bunch of people that are interested in getting themselves—bettering themselves, and what have you. And we are learning by it, if nothing else." (Tr. 305-306)

Victor Antone testified that he now lived in the Salamatoff area near Bertha Monfor, and had lived there since 1957 or 1958 except for about four years, and that he was there in 1970. (Tr. 309-312)

Emery Showalter testified that he moved to Salamatoff in 1960 or 1961 when he got some land from George Miller's

homestead, that prior to moving to the Salamatoff area he had lived and fished for a time in the Nikishkia Dock areas, the East Foreland areas, the McKinsey Point area, and the Kalifonsky Beach area and a little later had fished clear down as far as "Chinitna Bay" but that since he moved to Salamatoff he has been drift fishing for Columbia Water cannery, using their boat and equipment. He testified that he is a member of the Russian Orthodox Church in Kenai and that Nick Kalifonsky is his Godfather. (Tr. 312-323)

Summary

In summary the record as whole shows the development of the North Kenai area as an offshoot of the town of Kenai. The residents of the Salamatoff Beach area generally came from Kenai and lived in Kenai prior to their move to land along the beach. They were generally raised in the town of Kenai and their parents lived there while they were growing up. Prior to moving to Salamatoff, whether to homesteads, to Native allotments or to land purchased from some other person, the people and their parents, lived in Kenai in the winter and traveled to the Salamatoff area as well as other areas up and down the Kenai Peninsula to fish, hunt and trap. With the influx of non-Native homesteaders in the late '40's and the subsequent road construction into the north Kenai area many of the Native families residing in Kenai moved North into the Salamatoff beach and the remainder of the north Kenai area. There is no evidence, however, that a separate community was established, the peoples social ties still seemed to remain with the town of Kenai where they go to church and where the stores and schools are located.

In his post-hearing brief, on behalf of the village of Salamatoff, the respondent argues that the village qualifies as a clan within the definition in Section 3(c) of the Act. However, the evidence produced at the hearing fails to prove the existence of such a clan, what the evidence does

show is that there are two extended families, several members of which occupy generally the areas shown on BSF&W Exhibit #5 and that the members of these two families are acquainted with one another, as would be expected of persons living in such proximity. What the evidence does not show, however, is that these two families have in any manner conjoined their leadership in such a fashion as to unify them into a clan, and considered separately neither of the families show 25 or more members living in the Salamatoff beach area in 1970. (See Exhibits C & D)

The evidence of an association prior to 1970 is extremely weak, consisting of some rather vague testimony about a couple of meetings that were held in 1968 or 1969 for the purpose of doing something about Native allotments. BIA Exhibit 202 is the Certificate of Incorporation and Articles of Incorporation of the Salamatoff Native Association Inc., dated in November of 1972, which was incorporated solely for the purpose of meeting the requirements of the Alaska Native Claims Settlement Act. There is a complete absence of convincing evidence that any such association, even on an informal level, existed prior to April 1970.

To the extent that there was any testimony as to tribal ties, the testimony indicated membership in the Kenaitze Indian tribe and did not suffice to show the existence of a separate band, either within the tribe, or separate from it, in the Salamatoff area.

Therefore, the Board finds and concludes that the persons enrolled to Salamatoff do not constitute a "tribe, band, clan, group, village, community, or association" within the meaning of Section 3(c) of the Act.

In addition, there appears to be substantial doubt whether the occupancy of the Salamatoff area by the Native people was "consistent with the Natives own cultural patterns and life style." Rather the evidence seems to establish that the Native people moved into the area with the general

influx of non-Native persons in the late '40's and early '50's, that they took up homesteads and allotments along the roads which were established in the north Kenai area at that time in the same manner as non-Native persons, that the movement of Native persons into the area was not for any purpose peculiar to Natives cultural patterns and life style, but was simply for the purpose of finding a better homesite in the same respect as for non-Native persons who moved into the area, that the social, cultural, and economic ties (church, schools, stores, canneries and oil industry) remained centered in the town of Kenai, and diffused throughout the general Kenai Peninsula. The testimony with regard to the use of fish sites in the Salamatoff beach area is not considered sufficient to establish that the occupancy was established for a purpose "consistent with the Natives own cultural patterns and life style" within the meaning of 43 CFR 2651.2 (b) (2) because the testimony establishes that these same Natives fished in the same manner at many other places along the Kenai Peninsula and in addition that many non-Native persons, and others not enrolled to Salamatoff used the Salamatoff beach area as well as other places along the Peninsula in the same manner and in close proximity to the Natives enrolled to Salamatoff. Rather, the inference appears very strongly from the record that the reason for the establishment of the homesites in the Salamatoff area by Natives, and others, was the establishment of the road system in the late 40's and early 50's.

Therefore, the Board finds and concludes that Salamatoff did not have "on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives own cultural patterns and life style".

Summary of Findings

(1) The Board finds and concludes that the persons enrolled to Salamatoff do not constitute a "tribe, band, clan,

group, village, community, or association'' within the meaning of Section 3(c) of the Act; and

(2) The Board finds and concludes that Salamatoff did not have ''on April 1, 1970, an identifiable physical location evidence by occupancy consistent with the Natives own cultural patterns and life style.''

DECISION

The Native village of Salamatoff listed in Section 11(b)(1) of the Alaska Native Claims Settlement Act is hereby certified as *not* eligible for benefits under Section 14(a) and (b) of the Alaska Natives Claims Settlement Act.

DATED this 9th day of June, 1974, at Anchorage, Alaska.

This represents a unanimous decision of the Board.

DATED this 10th day of June, 1974, at Anchorage, Alaska.

/s/ JUDITH M. BRADY
Judith M. Brady, Chairman
Alaska Native Claims Appeal Board

/s/ ALBERT P. ADAMS
Albert P. Adams, Board Member

/s/ ABIGAIL F. DUNNING
Abigail F. Dunning, Board Member

/s/ JOHN A. WALLER
John A. Waller, Board Member

APPROVED: June 14, 1974

/s/ ROGERS C. B. MORTON
Secretary of the Interior

APPENDIX N

UNITED STATES DEPARTMENT OF THE INTERIOR
ALASKA NATIVE CLAIMS APPEAL BOARD

P. O. Box 2433
Anchorage, Alaska 99510

STATE OF ALASKA, SIERRA CLUB, PHIL HOLDSWORTH & ALASKA WILDLIFE FEDERATION AND SPORTSMEN'S COUNCIL, MATANUSKA-SUSITNA BOROUGH, *Appellants*

v.

ALEXANDER CREEK, INC., COOK INLET REGION, INC., and BUREAU OF INDIAN AFFAIRS, *Respondents*

ANCAB #VE 74-31
ANCAB #VE 74-35
ANCAB #VE 74-54
ANCAB #VE 74-61

Involving the eligibility of the Village of Alexander Creek for benefits under the Alaska Native Claims Settlement Act of December 18, 1971

Received Nov. 11, 1974

DECISION

Preface

This is a decision on the eligibility of the Village of Alexander Creek for status as a Native village under the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C., §§ 1601-1624 (Supp. II, 1972), hereinafter referred to as the Act, and the Secretary of the Interior's Rules and Regulations on Alaska Native Selections, 43 CFR, Part 2650. Status as a village confers certain statutory benefits under the Act, including the right to select substantial quantities of land and receive patent conferring the surface rights associated with the land. Subsurface rights to village lands may be patented to the regional corporation for the region in which the village is located.

The Act in Section 3(c) defines the term "Native village" as "any tribe, band, clan, group, village, community, or association in Alaska listed in sections 11 and 16 of the Act, or which meets the requirements of this Act, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives."

Statutory criteria for village eligibility are contained in Section 11(b)(2), of the Act, 43 U.S.C. § 1610(b)(2), which provides:

> Within two and one-half years from the date of enactment of this Act, the Secretary shall review all of the villages listed in subsection (b)(1) hereof, and a village shall not be eligible for land benefits under subsections 14(a) and (b), and any withdrawal for such village shall expire, if the Secretary determines that—
>
> (A) less than twenty-five Natives were residents of the village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; or,
>
> (B) the village is of a modern and urban character, and the majority of the residents are non-Native.

In addition, Section 11(b)(3) of the Act, 43 U.S.C. § 1610 (b)(3), provides:

> Native villages not listed in subsection (b)(1) hereof shall be eligible for land and benefits under this Act and lands shall be withdrawn pursuant to this section if the Secretary within two and one-half years from the date of enactment of this Act, determines that—
>
> (A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration

> date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and
>
> (B) the village is not of a modern and urban character, and a majority of the residents are Natives.

Implementing regulations in 43 CFR 2651.2(b) provide:

> (1) There must be 25 or more Native residents of the village on April 1, 1970, as shown by the census or other evidence satisfactory to the Secretary. A Native properly enrolled to the village shall be deemed a resident of the village.
>
> (2) The village shall have had on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style and at least 13 persons who enrolled thereto must have used the village during 1970 as a place where they actually lived for a period of time; *Provided,* that no village which is known as a traditional village shall be disqualified if it meets the other criteria specified in this subsection by reason of having been temporarily unoccupied in 1970 because of an Act of God or government authority occurring within the preceding 10 years.
>
> (3) The village must not be modern and urban in character. A village shall be considered to be of modern and urban character if the Secretary determines that it possessed all of the following attributes as of April 1, 1970:
>
> (i) Population over 600.
>
> (ii) A centralized water system and sewage system that serves a majority of the residents.
>
> (iii) Five or more business establishments which provide goods or services such as transient accom-

modations or eating establishments, specialty retail stores, plumbing and electrical services, etc.

(iv) Organized police and fire protection.

(v) Resident medical and dental services, other than those provided by Indian Health Service.

(vi) Improved streets and sidewalks maintained on a year-round basis.

(4) In the case of unlisted villages, a majority of the residents must be Native, but in the case of villages listed in sections 11 and 16 of the Act, a majority of the residents must be Native only if the determination is made that the village is modern and urban pursuant to subparagraph (3) of this paragraph.

Regulations in 43 CFR 2651.2(a) established a procedure for determining whether a village meets the above criteria for eligibility. In the case of a village not listed in Section 11(b)(1) of the Act, the authorized representative of the village may file an application for a determination of the village's eligibility for benefits.

The determination is made by the Director, Juneau Area Office, Bureau of Indian Affairs, by a process involving publication of a proposed decision, subject to protest by interested parties; consideration of protests; and publication of a final decision on village eligibility which may be appealed to the Secretary. Appeals to the Secretary are made to an ad hoc board which he has personally appointed, at least one member of which must be familiar with Native village life. Appeals to the Board are governed by applicable regulations in 43 CFR 4.700-4.704.

43 CFR 4.704, as amended January 21, 1974, 39 Fed. Reg. 2366 (1974), provides:

Any hearing on such appeals shall be conducted by the Ad Hoc Appeals Board or a member or members thereof, or by an Administrative Law Judge of the Office of Hearings and Appeals and shall be governed insofar as practicable by the regulations applicable to other hearings under this part.

The Ad Hoc Appeals Board has subsequently been designated the Alaska Native Claims Appeal Board and will hereinafter be referred to as the Board.

The unlisted Village of Alexander Creek filed an application for eligibility on August 29, 1973, and was determined eligible by the Acting Director, Bureau of Indian Affairs, Juneau Area Office, in a decision published in the Federal Register on December 21, 1973.

Within 30 days of the date of publication, the State of Alaska, Sierra Club, Alaska Chapter, Alaska Wildlife Federation and Sportsmen's Council, Inc., and Phil R. Holdsworth, and the Matanuska-Susitna Borough appealed such decision to the Board pursuant to 43 CFR 2651.2(a)(4). On May 20, 1974, Appellants Alaska Wildlife Federation and Sportsmen's Council, Inc., and Phil R. Holdsworth filed with the Board a Notice of Inability to Continue in Appeals Proceedings. Pursuant to such notice, the Board issued a Notice and Order dated May 24, 1974, dismissing them as parties appellant but conferring upon them the status of *amici curiae* and receiving all briefs and arguments previously filed as to legal issues therein.

On May 31, 1974, the Board issued a Notice and Order directing that a hearing be conducted by an Administrative Law Judge on the appeals. Pursuant thereto, a hearing was held in Anchorage, Alaska, on July 11-12-13. The parties were represented as follows: Appellants, State of Alaska by Stanley T. Fischer, Esq., Attorney General's Office, Juneau; Matanuska-Susitna Borough by John W. Sedwick, William F. Tull, and Edward Burton, Esqs., Burr, Pease & Kurtz, Anchorage; Respondents, Alexander Creek, Inc., and Cook Inlet Region, Inc., by F. Conger Fawcett, Esq.,

Graham and James, San Francisco, and Allen McGrath and Monroe Price, Esqs., Graham and James, Anchorage; Bureau of Indian Affairs by John Kelly, Esq., Regional Solicitor's Office, Office of the Solicitor, U.S. Dept. of the Interior, Anchorage, and Robert Bruce, Esq., Office of the Solicitor, U.S. Dept. of the Interior, Washington, D.C. Appellant, Sierra Club made no appearance at the hearing; therefore, it was dismissed as a party, but was accorded the status of *amicus curiae*.

Stipulations

At the hearing, following a pre-hearing conference and prior to presentation of the case, the parties entered into the following stipulations:

1. That the Village of Alexander Creek is not modern and urban, and that the "act of God" provision is not an issue. (Tr. 4, 44).

2. The official BIA file previously filed with the Board will be made a part of the official record in this proceeding. (Tr. 19).

Issues

The general issue in this proceeding is whether Alexander Creek meets the village eligibility requirements of Section 11(b)(3), of the Act, 43 U.S.C. 1610(b)(3), and the regulations set forth at 43 CFR 2651.2(b). The specific issues are:

1. Whether the Village of Alexander Creek had on April 1, 1970, 25 or more Native residents as shown by the census or other evidence satisfactory to the Secretary.

2. Whether the Village of Alexander Creek had on April 1, 1970, an identifiable location evidenced by occupancy consistent with the Natives' own cultural patterns and life style.

3. Whether at least 13 Natives who are enrolled residents of the village of Alexander Creek used the village during 1970 as a place where they actually lived for a period of time.

4. Whether, on April 1, 1970, the majority of the residents of the Village of Alexander Creek were Natives.

5. Whether Alexander Creek was an established village on April 1, 1970, and whether the persons enrolled to the village constitute "a tribe, band, clan, group, village, community, or association" within the meaning of Section 3(c) of the Act.

Decision of Administrative Law Judge
Findings and Conclusions

The Administrative Law Judge made the following findings in his Recommended Decision submitted to the Board:

1. The evidence viewed as a whole raises a substantial doubt whether there were 25 or more Native residents of Alexander Creek on April 1, 1970; and whether at least 13 enrollees used Alexander Creek as a place where they actually lived for a period of time. (ALJ Recommended Decision, p. 32).

2. Respondents have failed to come forward with evidence sufficient to rebut the doubt raised by the Appellants (on these two issues). (ALJ Recommended Decision, p. 32).

3. Twenty-eight (of the 37 enrollees to Alexander Creek) were not residents of Alexander Creek on April 1, 1970, and did not use it as a place where they actually lived for a period of time during 1970. (ALJ Recommended Decision, p. 33).

4. Alexander Creek is not a village within the meaning of Section 3(c) of the Act. (ALJ Recommended Decision, p. 36).

5. Alexander Creek did not have on April 1, 1970, a village "evidenced by occupancy consistent with the Natives' own cultural patterns and life style." (ALJ Recommended Decision, p. 36).

6. There was no Native majority at Alexander Creek in 1970. (ALJ Recommended Decision, p. 36).

7. Alexander Creek is not eligible for benefits under the Act. (ALJ Recommended Decision, p. 37).

RULINGS ON MOTIONS

The following rulings on pending motions were made by the Administrative Law Judge during the course of the hearing.

1. As to Respondents' motion to dismiss the appeal of the State of Alaska on the basis of standing, the motion was denied. The Board concurs, for reasons to be stated in the discussion of standing herein.

2. As to Respondents' motion that the appeal of the Sierra Club be dismissed, the motion was granted to the extent that the Sierra Club, having made no appearance at the hearing, was dismissed as a party appellant. The Sierra Club was given limited standing as an *amicus curiae* and its brief and arguments previously filed with the Board were considered. The Board concurs as no substantial prejudice to any other party results from this discretionary ruling.

3. As to Respondents' motion that the appeal of the Alaska Wildlife Federation and Sportsmen's Council and Phil R. Holdsworth, and the Matanuska-Susitna Borough be dismissed on the basis of standing, the parties were informed by the Administrative Law Judge that he could not consider any previous motions filed with the Board which have been the subject of previous Board rulings. On May 24, 1974, in response to "Notice of Inability to Continue in Appeals Proceedings," the Board ordered that Alaska Wildlife Federation and Sportsmen's Council and Phil R. Holdsworth be dismissed as parties appellant and that all briefs and legal arguments on legal issues previously filed by them will be considered as *amici curiae*. On May 24, 1974, in response to motions to dismiss the Matanuska-Susitna Borough on the basis of standing, the Board denied the motions and ruled that the Matanuska-Susitna Borough has standing to appeal. The Board hereby reaffirms both Orders.

4. As to the renewed motion by Respondents for a preliminary ruling with respect to the definition and application of the term "permanent resident," the motion was denied. The Board concurs, for reasons stated in the discussion of residence herein.

5. As to Respondents' motions made at the conclusion of the Appellants' case to dismiss for failure of the Appellants to prove their case and for failure to show that they have been harmed by the findings of the BIA Area Director as to the eligibility of the village, the former motion was taken under advisement by the Administrative Law Judge during the hearing and denied in his Recommended Decision to the Board. (ALJ Recommended Decision, p. 32). The latter motion as to harm (standing) was denied. The Board concurs with both rulings for reasons stated herein.

6. As to Respondents' renewed motion to dismiss at the conclusion of the hearing, the Administrative Law Judge took the motion under advisement and denied it in his Recommended Decision to the Board. The Board concurs insofar as the rulings in this decision constitute a determination as to the issues on which Appellants met their burden of raising a substantial doubt.

7. As to Respondents' motion for an opportunity to file exceptions to the Administrative Law Judge's Recommended Decision prior to its submission to the

Board, the motion was denied. The Board concurs. The fact that Respondents were afforded opportunity to submit proposed findings and conclusions to the Administrative Law Judge prior to the issuance of his decision satisfied the requirement that each party prior to final decision be afforded reasonable opportunity to submit proposed findings and conclusions *or* exceptions to the decision or recommended decisions of subordinate officers. *Watson Bros. Transportation Co.* v. *United States,* 180 F. Supp. 732 (D. Neb. 1960).

8. As to Respondents' motion to review the decision of the Board prior to its submission to the Secretary, the motion was denied, without prejudice to its renewal before the Board. The motion was renewed in Respondents' "Motion for Disclosure of and Opportunity to Comment on Recommended Decisions" dated August 20, 1974. The Board denies the motion for the reason stated in paragraph 7 above.

9. As to Respondents' "Motion to Strike" from the record certain documentary evidence offered by the Appellant State of Alaska and received in evidence at the hearing, the motion was denied by the Administrative Law Judge in a separate ruling dated August 20, 1974. The Board concurs for the reasons stated in the ruling. (See "Ruling Denying Motion to Strike, Appendix B.)"

Discussions of Motions

STANDING

The standing of Appellants State of Alaska and Matanuska-Susitna Borough is challenged on the grounds that they cannot be "part(ies) aggrieved" within the meaning of 43 CFR 4.700. Respondents argue that "the Borough can have no interest in the disposition of federal lands in settlement of aboriginal native claims, except insofar as the Borough could receive federal lands through the State. The

State, however, in the Statehood Act, has agreed to take its land subject to Native land claims. Thus, the Borough has no more interest than the State, which is no interest at all." (Appellee's Motion to Dismiss for Lack of Standing, dated May 1, 1974.)

Respondents' arguments relating to standing of the State of Alaska and the Matanuska-Susitna Borough are not well taken. Under Section 11 of the Act and subject to certain exceptions, the lands in each township contiguous to and which corner upon the township that encloses an approved Native village are withdrawn from all forms of appropriation under the public land laws and from selection under the Alaska Statehood Act, as amended.

In "Response to Motion to Dismiss for Lack of Standing," dated May 30, 1974, the State asserted that it has "valuable interests in land, including selection rights, in the areas which will be subject to selection by the respondent corporations (including Alexander Creek) if they are determined to be eligible." The State's interest is thus clear; it will not be able to obtain such land if the village is determined eligible, which it may have obtained in the absence of any such determination. *Department of Natural Resources, State of Alaska,* v. *Village of Manley Hot Springs, ANCAB* VE #74-6, VE #74-15, VE #74-16, at p. 8 (June 10, 1974).

In support of its standing, the Matanuska-Susitna Borough argues that it has the right to receive 10 percent of the State's land selections undertaken pursuant to the Statehood Act, ALAS. STAT. Section 29.18.190; that Alexander Creek is located within the Borough; and that if Alxander Creek is "erroneously certified," the Borough would lose "6,912 acres or more." (Appellants' Response to Appellees' Motion to Dismiss for Lack of Standing, dated May 7, 1974, p. 1).

The Board therefore concludes that the potential for conflict between land selections by the State, the Borough, the

Village of Alexander Creek and the Cook Inlet Regional Corporation, establishes a nexus between the State, the Borough and the village sufficient to assure full presentation of factual evidence relevant to the village's eligibility. This ruling is consistent with the Board's previous rulings on standing, *Manley Hot Springs,* supra, pp. 6-8; *Forest Service, United States Department of Agriculture,* v. *Village of Kasaan,* ANCAB VE #74-17, VE #74-18, at pp. 13-1 (June 10, 1974).

RESIDENCE

Insofar as an issue presented for decision in this appeal is whether or not the village of Alexander Creek had 25 Native residents on April 1, 1970, and Respondent has moved to exclude consideration of the question of residence of enrolled persons, it is appropriate to discuss the Board's jurisdiction to consider evidence on residence, and the Board's definition of residence within the contemplation of the Act and implementing regulations.

BOARD'S JURISDICTION TO REVIEW RESIDENCE

The Board reaffirms its previous rulings on its jurisdiction to review the residence of enrolled Natives in *Department of Natural Resources, State of Alaska,* v. *Village of Manley Hot Springs,* ANCAB #VE 74-6, VE 74-15, VE 74-16 (June 10, 1974) at pp. 14-19:

> As to the assertion that certain issues relating to enrollment are outside the Board's jurisdiction:
>
> (a) Enrollment for purposes of determining the status and eligibility of the individuals as Alaska Natives is outside the jurisdiction of the Board, and the Board will not hear appeals from Decisions of the Enrollment Coordinator.
>
> (b) The Enrollment Coordinator is not a necessary party before the Board because the only administrative determination properly appealed and within the

> Board's jurisdiction on this appeal is the Final Decision of the Area Director on the eligibility of the village.
>
> (c) The regulations in 43 CFR § 2651.2(b)(1) provide for an investigation and examination by the Area Director of "available records and evidence that may have a bearing on the character of the village and its eligibility."
>
> (d) The regulations in 43 CFR § 2651.2(b)(1) direct the Area Director to consider the residence of Natives "properly" enrolled to the village as shown on the roll, but also direct the Area Director to consider the census and other evidence.
>
> (e) Since the regulations thus recognize that the determinations of village eligibility and enrollment are separate decisions, made by separate officers, under separate procedures, this Board has jurisdiction to review the final decision of the Area Director on the eligibility of the village . . . but is not required to review the enrollment of the individuals as determined by the Enrollment Coordinator.
>
> Therefore, in deciding appeals from the Area Director's decisions on village eligibility, where the question of whether a village has the requisite minimum of 25 Native residents, as set forth in 43 CFR § 2651.2(b)(1), is in issue, the Board will consider evidence on such questions including, but not limited to, evidence of residence as shown on the roll.—Order Denying Motions to Dismiss, dated March 25, 1974.
>
> This order constitutes a ruling by the Board that it does have jurisdiction to determine the residence of enrolled Natives in connection with the determination of village eligibility.—*Manley Hot Springs,* supra, pp. 14-15 (1974)

BASIS OF JURISDICTION ON RESIDENCE

This decision is based on construction of the Act and applicable regulations.

Section 5(a):

> The Secretary shall prepare within two years from the date of enactment of this Act a roll of all Natives who were born on or before, and who are living on, the date of the enactment of this Act. *Any decision of the Secretary regarding eligibility for enrollment* shall be final. (Emphasis added)

The finality of the Secretary's decision goes to eligibility, i.e., determination of sufficient blood quantum for individual placement on the Roll.

Section 5(b):

> The roll prepared by the Secretary *shall show* for each Native, among other things, the region and the village or other place in which he resided on the date of the 1970 census enumeration, and he shall be enrolled according to such residence. (Emphasis added)

There is no inference of finality of decision insofar as the residence of individuals on the roll is concerned, according to the language in the Act. However, the language "shall show" establishes a strong presumption of the correctness of the residency shown on the Roll. To interpret otherwise would lead to the conclusion that the Roll, insofar as it presumes to establish residence, is a futile endeavor.

Finally, the Roll signed by the Bureau of Indian Affairs Enrollment Coordinator and approved by the Secretary on December 17, 1973, certifies only that persons listed on the Roll were determined to be eligible for enrollment as Alaska Natives.

> Upon completion, the Coordinator shall affix to the Roll a certificate indicating that to the best of his knowledge and belief the Roll contains only the names of persons who were determined to meet the requirements for enrollment as Alaska Natives. The Roll shall be submitted to the Secretary for approval. (25 CFR 43h.9)

The differing language of the statute regarding eligibility and residency on the roll reflects a unique Indian enrollment required by the Alaska Native Claims Settlement Act. Since the settlement involves both land and money entitlements, and since these settlement entitlements accrue, in most part, (exceptions in § 14(h)) to regional and village corporations and enrollee-stockholders of these corporations, the roll had first to establish who was eligible to participate in the benefits of the settlement—i.e., who was an Alaskan Native. Second, the roll had to provide the basis for determining the kinds of benefits an individual would receive—i.e., whether as a stockholder of a village corporation and/or, a stockholder of a regional corporation. Third, the roll had to provide, on the basis of an individual's claimed residence, information as to the proportional amount of land and money entitlements the village and regional corporations will receive insofar as these are based on population.

Certification of the roll with a final determination as to eligibility of Natives and a showing of residence to determine individual benefits and assignment of proportional money and land entitlements to the village and regional corporations occur, under the timetable in the Act, prior to a determination of village eligibility.

Determination of village eligibility, under the Act and regulations, occurs after completion of the roll, but nevertheless requires a second round of fact finding.

Section 3(c):

> "Native village" means any tribe, band, clan, group, village, community, or association in Alaska listed in

> Sections 11 and 16 of this Act, or which meets the requirements of this Act, and *which the Secretary determines* was on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, *who shall make findings of fact in each instance*), composed of twenty-five or more Natives.... (Emphasis added)

The determination by the Secretary as to what qualifies as a Native village must be based on findings of fact, according to the language of the statute.

Section 11(b)(2):

> Within two and one-half years from the date of enactment of this Act, the Secretary *shall review* all of the villages listed in subsection (b)(1) hereof, and a village shall not be eligible for land benefits under subsections 14(a) and (b), and any withdrawal for such villages shall expire *if the Secretary determines that*—
>
> (A) less than twenty-five Natives were residents of the village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; or,
>
> (B) the village is of a modern and urban character and the majority of the residents are non-Native. (Emphasis added)

Section 11(b)(3):

> Native villages not listed in subsection (b)(1) hereof shall be eligible for land and benefits under this Act and lands shall be withdrawn pursuant to this section *if the Secretary* within two and one-half years from the date of enactment of this Act, *determines* that—
>
> (A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and
>
> (B) the village is not of a modern and urban character, and a majority of the residents are Natives. (emphasis added)

The statutory language mandates a Secretarial review and fact-finding before final determination of the eligibility of a village, and the mandate is inclusive as to the requirements for eligibility—25 residents of a village on April 1, 1970, and that the village not be of a modern and urban character.

Again, under the timetables in the Act, decisions as to eligibility and a showing of residency occur first: "The Secretary shall prepare *within two years* from the date of enactment of this Act, a roll...." § 5(a) (emphasis added). "*Within two and one-half years* from the date of enactment of this Act, the Secretary shall review all of the villages ..." § 11(b)(2) and (3). (Emphasis added)

Instead, Congress mandated that the Secretary, with the roll completed and information on it available to him, make a review and finding of fact on every village to determine whether it was, on the April 1, 1970 census date, composed of 25 Native residents and was not modern and urban in character.

Because the compilation and certification of the roll precedes in time the determinations of village eligibility, Congress had the opportunity to require that residency as indicated on the roll was to be conclusive for the purposes of determining village eligibility. The fact that Congress did not so provide indicated that Congress did not intend for the residency as indicated on the roll to be conclusive for such purposes.

If the residence as shown on the roll is, as Respondents argue, conclusive on the issue of the residence of enrolled

Natives, there would be no need to make a review and findings of fact in the determination of 25 residents.

Interior Department regulations affecting Native land selection reflect compliance with the Congressional fact-finding and review mandate in 43 CFR Part 2650.

§ 2651.2(a):

> Pursuant to Sections 11(b) and 16(a) of the Act, the Director, Juneau Area Office, Bureau of Indian Affairs, shall review and make a determination not later than December 19, 1973, as to which villages are eligible for benefits under the Act.

The parts following provide regulations for such determinations, including appeal procedures to this Board.

The residence criteria pertaining to village eligibility are contained in § 2651.2(b)(1):

> There must be twenty-five or more Native residents of the village on April 1, 1970, as shown by the census or other evidence satisfactory to the Secretary. A Native properly enrolled to the village shall be deemed a resident of the village.

If this paragraph contained only the first sentence, there would be clearly no question regarding the Board's jurisdiction to review the issue of residence. It is the second sentence which has been asserted as a conclusive presumption in favor of residence as determined by the Enrollment Coordinator. However, this construction renders the word "properly" superfluous in the sentence. Reading the sentence with the word "properly," however, seems to conflict with the phrase "shall be deemed," since a Native "resident" of a village is necessarily "properly enrolled" to the village. Giving effect to both the word "properly" and the phrase "shall be deemed" in the sentence clearly creates a rebuttable presumption that a Native who is enrolled to a village is a resident of that village.

This construction is consistent with other rebuttable presumptions normally used by courts and administrative agencies, such as the presumption that public officials have performed their duty in the proper manner, and the presumption that a person's statements on an official government form are true and accurate to the best of his knowledge and belief.

This rebuttable presumption was adopted by the Board for all village eligibility appeals concerning villages listed in Section 11(b)(1) of the Act. *Department of Natural Resources, State of Alaska,* v. *Village of Manley Hot Springs,* ANCAB, VE 74-6, VE 74-15, VE 74-16 (June 10, 1974).

> b. Persons who appear on the Roll of Alaska Natives as residents of a named village are rebuttably presumed to be residents of the village named for purposes of village eligibility determination.—*Manley Hot Springs,* supra, at page 19 (1974).

The rebuttable presumption is consistent with Section 5(b) of the Act.

Therefore, the Board concludes that it has jurisdiction to review the residence of individuals enrolled as Alaska Natives for purposes of village eligibility determinations. The Board also rules that it does not have jurisdiction to review the determination of the Enrollment Coordinator, that a person meets the requirements for enrollment as an Alaska Native, since such determinations have been vested in the Enrollment Coordinator and the Regional Solicitor by regulations in 25 CFR Part 43h, subject only to the approval of the Secretary, pursuant to 25 CFR 43h.9. The Board takes official notice that persons listed as eligible on the Roll of Alaska Natives approved by the Secretary are "Natives" within the meaning of the Act and regulations.

Definition of Permanent Residence

For determinations of village eligibility, the Board adopts the same definition of residence used by the Enrollment Coordinator, contained in 25 CFR 43h.1(k):

> "Permanent residence" means the place of domicile on April 1, 19[illegible], which is the location of the permanent place of abode intended by the applicant to be his actual home. It is the center of the Native family life of the applicant to which he has the intent to return when absent from that place. A region or village may be the permanent residence of an applicant on April 1, 1970, even though he was not actually living there on that date, if he has continued to intend that place to be his home.

It is helpful to compare this definition of permanent residence with the concept of "home," defined in the Restatement (Second) of Conflict of Laws § 12, (1971) as "the place where a person dwells and which is the center of his domestic, social, and civil life." The comments indicated that when determining whether a place is a person's home, consideration should be given to its physical characteristics, the time one spends there, the things one does there, his intention when absent to return to that place, other dwelling places of the person and similar factors concerning those other dwelling places. Restatement (Second) of Conflict of Laws § 12, Comment C at 50 (1971).

Other factors in the definition in 25 CFR 43h.1(k) recognize the special situation of Alaska Natives, where Native family life may be characterized by patterns of kinship and activities substantially different from non-Native family life. In addition, the definition recognizes the frequently transient life style of Alaska Natives. Thus, the definition emphasizes the factors of Native family life and intent to return.

While intent is obviously subjective and personal, it is frequently capable of objective proof, and where objective evidence is presented which contradicts subjective intent, and the objective evidence is neither rebutted nor explained, it will clearly be persuasive. On the other hand, where economics, educational, or other requirements have temporarily deprived one of any real choice, and both the subjective intent and the objective evidence indicate a genuine connection with the place of enrollment, that place is considered to be the permanent residence of the individual within the meaning of 25 CFR 43h.1(k), notwithstanding that for other purposes a court or an administrative agency may find that person's residence or domicile to be some place other than his "permanent residence" as determined for purposes of the Alaska Native Claims Settlement Act.

SUMMARIES OF TESTIMONY

Testimony of Witnesses for Appellant Matanuska-Susitna Borough

Donald G. Tracey, Deputy Assessor for the Matanuska-Susitna Borough, testified that he is responsible for the supervision of appraisers and the appraisal of property for the Borough. Alexander Creek is within the Borough and he has made determinations for tax purposes as to who owned real property in Alexander Creek during the period January 1, 1970, to January 1, 1971. He produced a list of persons who owned real property at Alexander Creek during this period. (Exhibit AMSB-3). The persons listed are enrolled to the village. (Tr. 40-47).

Mr. Tracey stated that he compiled the list after comparing the official Native enrollment printout with his records and that his records indicated that only two enrollees owned real property at Alexander Creek, namely Carl (sic) Jakob Thiele and Lawrence Roberts. (Tr. 48-50).

Mr. Tracey testified that he compiled a similar list of persons who owned personal property and that none of

those enrolled to the Village declared any personal property for the period January 1, 1970, to January 1, 1971. (Tr. 51, Exhibit AMSB-4).

The Borough requires all Borough residents to file personal property declarations and this requirement is published in the newspaper. Some do not file such declarations and in some cases the Borough "force-files" for them. (Tr. 43, 55-56).

Mr. Tracey identified a map that he used in compiling his tax assessment information. (Exhibit AMSB-5). (Tr. 57-58).

On cross-examination, Mr. Tracey testified that all of the land which he identified by a circle on the assessment map was not surveyed and that such unsurveyed land would not appear on his records. Further, any person who held property under an Indian allotment restricted deed would also not appear on the list he compiled. Ownership of trailers would also not appear on his list. (Tr. 60-61). Household goods such as furniture and bedclothes are not taxed and would not appear on his list. (Tr. 63). His records also reflect that Emil and Vera Giese owned property at Alexander Creek in 1970 and 1971. (Tr. 65). He flew to the area shown by a circle on the assessment map once when there was snow on the ground. He observed some trails between buildings but wasn't sure what he observed. (Tr. 70).

Ernest W. Hawksworth, a non-Native, testified that he resides at Alexander Creek and has a house there. His home is located a mile from the confluence of Alexander Creek and the base of the Susitna River. Carl Thiele's house is downstream from his home. Mr. Hawksworth built his home over the past nine years and he first visited Alexander Creek in 1952. He visited there many times subsequent to 1952 as a commercial pilot flying people into the area. He lived on Alexander Creek in 1970 during the period March through December and has hunted there for

about 12 years. He has fished there for 20 years. (Tr. 71-75).

Mr. Hawksworth testified that people come to Alexander Creek from outside areas to hunt, fish, and visit relatives. In 1970, he estimated that 50 people visited the area. The people come in by raft, air, and mainly by boat. Earl Roberts did not live in his cabin or along Alexander Creek in 1970. (Tr. 77).

Mr. Hawksworth identified the cabin of Orville Mears and the house of Roy Verneer on an aerial map. (Exhibit AMSB-1). Mr. Verneer and his wife, now deceased, lived in his house in 1970. They are non-Native. He also identified other structures on the map, namely the property of Beverly Morris and George Trainer. Mr. Trainer lived on Alexander Creek in 1970; he is non-Native. He also identified some structures belonging to "Big Red," a pilot guide, Bob Beck's homestead, the Woodhead property located across the stream from his (Hawksworth) home, property owned by Bob Ducker, and Jack Gakey's house. Mr. Gakey lived in his house in 1970; he is non-Native. (Tr. 77-87).

Mr. Hawksworth testified that Carl Thiele occupied his property on Alexander Creek in 1970 and that it has always been his residence. Mr. Thiele's father was German and his mother was a Native Aleut. Carl's brother Reinhold Thiele has property on Alexander Creek and the Thieles made improvements on their properties in 1973, but not before 1970. There was a smokehouse nearby and as far as he knows it is "connected with Carl's father." He also identified Lawrence Roberts' property and stated that Lawrence and his wife occupied the property in 1970. Lawrence's father was non-Native and his mother was Eskimo. Lawrence's wife is non-Native. Emil Giese is German and his wife is Eskimo. Mr. Hawksworth identified another partly-finished building on the map and believed it belonged to one of the "Roberts boys." It was not occupied in 1970 nor was it worked on then. (Tr. 87-90).

Mr. Hawksworth testified that there are no community or public facilities at Alexander Creek, nor any community halls for meetings. There are no organizations, community projects, churches, or commercial establishments, and there were none as of 1970. He is not aware of anyone who is recognized as a leader or spokesman for some or any of the people at Alexander Creek, nor of anyone who was called a Native chief, leader, or head man, at any time during 1970 or during the period he has lived there or prior thereto. (Tr. 90-92).

He was not aware of any fishing camps at Alexander Creek in 1970. People come there for sport fishing but no permanent structures used for fishing camps existed there. There are no roads at Alexander Creek except a trail and a "Whitney Road" which extends one mile from an airstrip to a house. He is aware of no abandoned village at Alexander Creek. (Tr. 93).

Mr. Hawksworth referred to the list of enrollees and stated that in 1970 Emil and Vera Giese, Lawrence Roberts, Carl Thiele, Sr., and his son Carl, and Carl's mother June, lived at Alexander Creek. (Tr. 94, 95). Reinhold Thiele and his son Reinhold, Jr., did not live there in 1970. (Tr. 95).

In 1970, or at any time since he first went there, he never heard anyone talk of an existing Native village at Alexander Creek. He did hear talk that an Indian village existed over 20 years ago across the stream The village has never been occupied since he first visited the area, and he has never seen anything which would lead him to believe that a Native village existed at Alexander Creek at any time in 1970. (Tr. 96-97).

On cross-examination, Mr. Hawksworth testified that he has been a resident of Alaska for 35 years but was not an expert on the Native way of life, culture, habits, or life style. He knows of no Native village at Alexander Creek. In 1970 he lived in Anchorage but was at Alexander Creek from March through the end of the year. Carl Thiele and

his family lived at Alexander Creek in 1970 as did the Roberts family and Emil and Vera Giese. (Tr. 98-112).

Mr. Hawksworth considers a "real Native" to be one who lives out in a village and is mostly Native. If he is half blood or less, he is as white as he is Native. True Natives live in rural Alaska and not in cities. Although he conceded that Alexander Creek is rural, there is no semblance of a village there. No one paid any attention as to whether the Thiele and Roberts families were Natives until the Alaska Claims issue came up. At that point, the families became more aware of their Native ancestry and spoke of it more. (Tr. 128-131).

Earl Roberts did not live at Alexander Creek in 1970. His cabin was dilapidated and run down and he didn't live there. He was employed as a maintenance man in Anchorage. Reinhold Thiele visited his brother frequently during 1970 and he was accompanied by his children. Reinhold had an airplane and would transport residents back and forth. Robert Thiele visited occasionally. (Tr. 131-133).

Mr. Hawksworth testified that he received some of his mail at Alexander Creek once a week and that it was delivered by airplane at the sandbar at the mouth of the river. He flew in his own supplies. (Tr. 134-135).

Carl Jacob Thiele did not live at Alexander Creek during 1970. Mr. Hawksworth did not see him there as a permanent resident or semi-permanent resident. Mr. Hawksworth knows the Novak family. Anna Louise Thiele Novak is Carl and Reinhold Thiele's sister. Mr. Hawksworth has seen Mr. Novak at Alexander Creek occasionally. The Giese family lived there many years but Mr. Giese recently moved to Anchorage. (Tr. 136-138).

Mr. Hawksworth testified that he does not own his land and he doesn't care whether the village is qualified for benefits. He simply wanted to tell the facts. (Tr. 139-140).

Reinhold Thiele has a fish site at McGuire Slough, some 15 miles from the mouth of Alexander Creek by boat. There are no other fish sites closer to Alexander Creek but there is one across from McGuire Slough which is equally as far from Alexander Creek. In 1970 there was a fish site at the Ivan River which is slightly closer to Alexander Creek, but still 15 miles from the mouth of the Creek by boat. (Tr. 146-149).

Jack Gakey, non-Native, Army retiree, testified that he has lived at Alexander Creek permanently for three years. He lived there for 93 to 120 days in 1970 during the last four months of the year. He was there briefly during March or April of 1970. Prior to 1970 he spent quite a bit of time there and first went there 12 years ago when he bought his property. He lived in his home for a year during 1965 or 1966 and for short vacations at other times. (Tr. 152-153).

Mr. Gakey identified certain structures and buildings from photographis contained in the BIA file. (Tr. 154-158).

Mr. Gakey testified that he has never heard anyone speak of an existing Native village at Alexander Creek. He has been told of an old abandoned Indian Native village at Alexander Creek and recalled reading some history which indicated that the villagers fought with the Kroto Indians who lived up the Susitna River. (Tr. 159-160).

On cross-examination, Mr. Gakey testified that he knows the Roberts and Thiele families as neighbors. He has been told they are Natives. (Tr. 162).

Testimony of Witnesses for Appellant State of Alaska

Jean Ogilvie, employed by the State of Alaska Election Supervisor's Office, testified as to certain election districts depicted on a 1965 and 1973 State reapportionment map of election districts. (Exhibits AS-3 and AS-4). Alexander Creek was located in election district 6 as of 1972 and in district 7 as of 1965. Although the numbers have changed, the areas have only changed "a little bit." A person living

at Alexander Creek would vote in the Susitna District. (Tr. 175-182).

Counsel for the State of Alaska introduced copies of birth certificates, marriage certificates and drivers' licenses pertaining to the enrollees to Alexander Creek and those persons shown on the BIA family list printout and family tree in order to establish that the persons enrolled to Alexander Creek were in fact permanent residents of places other than Alexander Creek as of April 1, 1970. (Tr. 184-262, Exhibits AS-1 through AS-11).

Testimony of Respondents Village and Region Witnesses

Karen Thiele testified that she is a Native enrollee to the village of Alexander Creek and that she presently lives in Anchorage. She attends the University of Alaska in Anchorage and was born in Anchorage. She considers her home to be Alexander Creek. Carl Thiele is her father. Her Aunt Bertha Tolbert's children are not enrolled to Alexander Creek and her Uncle Robert and his wife are enrolled to Seldovia. She identified various members of the Thiele family from a "family tree" list. She identified June Thiele as her mother and the mother of Carl Thiele's children shown on the list. She identified Reinhold Thiele's wife as Gloria and George Thiele's children's mother as Mary Lou, his first wife. (Tr. 271-279).

Miss Thiele stated that she has lived all of her life at Alexander Creek and was educated at home during her elementary school years through correspondence studies and was taught by her mother. She finished her last year of high school in 1972 and moved into a rented apartment in Anchorage with her family. Her father came to the apartment "off and on" when he was not trapping. During, the past year she and her older sister lived in the apartment in Anchorage and the rest of the family, namely her mother, father, and brother Carl Gustav, Theresa, Cynthia and Tamara, lived at Alexander Creek. All of her family were

living at Alexander Creek in 1970 in her mother and father's house. During the latter part of 1970 her family moved to the State of Washington where her father was building a barge. During the recent years she visited Alexander Creek for about a month during Christmas and now that her brother owns an airplane, she goes back quite often. At the present time her mother and sisters Theresa and Tamara are at the Creek and her sister Cynthia is in Seward. Her brother and father are at Bristol Bay where her father is running a barge as a tender. Her father has gone to Bristol Bay in previous years to set nets. Her father started setting nets at Bristol Bay in 1971 or 1972. Her father had eight set nets which were used by the family. Her Uncle George also has nets there and Lawrence Roberts also went with her father. (Tr. 279-284).

Miss Thiele identified six photographs taken on April 16, 1974, which depict certain homes and structures at Alexander Creek. She identified one of the photographs as that of an old smokehouse behind her Uncle Reinhold's house and stated that it was standing on the property in 1970. She was not sure as to whether the storage shed or house were standing in 1970. She identified a photograph of a partially-finished building toward the mouth of the Creek as a house that Donald Roberts was building several years ago but was never finished. Her father uses it for stretching and drying skins when he is trapping. Earl Roberts has a house five or six miles from the Creek. (Tr. 284-288).

Miss Thiele stated that there is no area along the Alexander Creek that she considers would be a village. However, she regards the area "where we all are" as depicted by the photographs to be the village of Alexander Creek. She would consider Earl Roberts place to be part of the area but that "he's not all the time here." She identified a photograph (Exhibit R-VR-5) as a group of buildings belonging to Andrew Anderson which were across the Creek from her family's bunkhouse. The building is no longer there and it was flooded and burned down as much as 10

years ago, but she was so young she could not be sure. She and her brothers used to play on the property. (Tr. 289-292). The Anderson buildings were not in existence in 1970. (Tr. 295-296).

Miss Thiele stated that her Uncle Reinhold has a fish site on the Cook Inlet mud flats. The fish camp was not within the area depicted by an aerial map of the Alexander Creek area which is in evidence. Her father also had an interest in a fishing camp at the same location as her uncle but he no longer has it and gave it up in 1972 when he sold it to his brother Reinhold. She has visited the fish sites every summer where her family fished until they started fishing at Bristol Bay. During the summer months they lived at the fish camp in a couple of buildings. Reinhold's family also fished there. Her family used the fish for themselves and her father and "the boys" were more concerned with fish which were sold to the canneries. She considers the fish camp an important part of her life's routine as well as that of her family. (Tr. 299-302).

Before he built his new home, Miss Thiele's Uncle Reinhold came to Alexander Creek and stayed overnight at her family's home. He stored his fishing gear in their boathouse. Her Uncle Reinhold is a commercial pilot and also owns a small private airplane which he uses to fly in with his family. He would fly in on holidays and would also fly to the fish camp. He did this during 1970 also. Her Uncle George came to Alexander Creek last year and the year before and came there some time every year and stayed at her house. He traps and fishes and his main occupation is that of a guide. He has a commercial pilot's license and owns two airplanes. Her Aunt Louise visits Alexander Creek "a couple of times a year" and is afraid of airplanes. Her aunt's children also visit the Creek on an annual basis more frequently than their mother. Her aunt's husband is employed as a mechanic for Wien Consolidated. Her Uncle George visited the Creek several times during

the summer of 1970 to fish. Her Aunt Louise (Novak) and Aunt Bertha (Tolbert) visited the Creek for a month in 1970 and stayed at her home (Thiel's). Louise's husband would fly in over the weekends while not working. Bertha's husband was in King Salmon. Bertha Tolbert visited once or twice a year. She lives a great distance from Anchorage and when she comes to Anchorage to visit a doctor she goes to the Creek. (Tr. 302-208).

Miss Thiele said water is pumped into her family's house at Alexander Creek. Electricity is obtained from a generator and heat is obtained from wood stoves and a propane range. Airplanes are used for transportation to and from Anchorage. Food is brought in by boat and the mail is delivered once a week. (Tr. 309-312).

Miss Thiele's father makes a living as a commercial fisherman, licensed guide, and trapper. He has traplines at Alexander Creek and sells the skins. Reinhold hunts for his family and is a licensed guide. Her family, Reinhold's family, and the Louise Novak family pick irishberries and blueberries and put them up in jars for the winter. Her family has gathered sea gull eggs at Seagull Lake Island which is located between the fish camp and her home. They eat the eggs as a part of their diet. (Tr. 312-314).

Donald Roberts and Harold Roberts were at Alexander Creek in 1970 once or more annually and would stay at their mother's house. Tom Roberts was there "least of all." (Tr. 325-326).

When she was young, she recalled her Uncle Reinhold spending summers at the fish camp. His children were there occasionally. In addition to fishing, her father hunted seals and beluga whales in Cook Inlet. Her grandmother and grandfather are buried "out by the Creek." Her father and Lawrence Roberts hunted and guided together commercially. (Tr. 328-329).

There is evidence of an old Indian village at the Creek in the form of pits dug into the ground, and platforms for burying the dead. Her father told her about an old Indian village. She recalled a Nick Barbone, Jr., as the son of the old Indian chief. Nick could have visited the "village," but she was pretty young and it was "a long time ago." (Tr. 328-331).

On cross-examination, Miss Thiele testified that she spent a couple of months at Alexander Creek during 1970 during July and August. She saw her Uncle Reinhold at Alexander Creek during 1970 on a couple of weekends. She saw her Uncle George there one time in 1970 when he came for sport fishing. She saw her Aunt Louise Novak and Aunt Bertha at Alexander Creek "probably in June of 1970." They were out just for a visit. Her father was there during 1970, as well as Louise Novak's husband. Bill Tolbert was not there during 1970, but Randall Thiele (her brother, not enrolled) was. Her mother, Reinhold's wife, Louise Novak's husband, and Randall Thiele are all Caucasian. (Tr. 338-341).

Miss Thiele related that she goes to Fairbanks to visit relatives and pick berries. She also has picked berries at the fish camp at Bristol Bay. Reinhold, Sr., has also picked berries there. (Tr. 344-345).

Miss Thiele testified that she did not know what kind of Native her father was. Although her enrollment application states she is Eskimo, she could not state whether that was true. She thinks she is part of a Native village. (Tr. 349-351).

She is not related to the Roberts family and believes they are Aleut Natives. She met Nick Barbone when she was probably six or seven years old. He lived in Tyonek which she believes to be on Cook Inlet. She has never visited there and visitors from Tyonek have never stayed at Alexander Creek. Her father told her that Nick Barbone was the son

of a chief. Her father told her that "Chief Barbone" was a spirit who lived underground by the smokehouse, and he told these stories especially at Halloween. (Tr. 351-355).

Her grandparents were buried, not laid to rest on stilted platforms. Her Uncle Reinhold erected a headstone to mark their graves. When she was in Anacortes, Washington in 1970, she intended to return to Alexander Creek. She does not intend to settle in Alexander Creek at the present in the sense of raising a family there since the man she marries will have to be in a town whee he can make a living. (Tr. 356-357).

Miss Thiele testified she does not speak any Eskimo, Indian, or Aleut, nor do her brothers, sisters, or cousins. (Tr. 363-364).

There was no "leader" as such at Alexander Creek in 1970, nor was there any village council. She saw her cousin Karl Vance Novak at least once in 1970 at Alexander Creek. He was living in Anchorage at the time. Her Uncle Reinhold also lived in Anchorage in 1970, as did his daughter, Elsie, Reinhold, Jr., Gloria, Karl, Tamara, Stephanie, and Louise. Reinhold's son George Frederick also lived in Anchorage in 1970. Her Uncle George lived in Fairbanks in 1970. She was not sure where George's children were living. Her Aunt Louise and her five children were living in Anchorage in 1970, and her Aunt Bertha lived in King Salmon. Her Uncle Reinhold owns a home in Anchorage and did so in 1970. Her Uncle George owns a home in Fairbanks and did so in 1970. Emil Giese owns a home in Anchorage and did so in 1970. William Tolbert owns a place in King Salmon and did so in 1970. (Tr. 365-370).

Miss Thiele testified that her Uncle Reinhold and Uncle George do not own traplines at Alexander Creek. There is no church at Alexander Creek. She has attended the Baptist Church at Muldoon. She doesn't know her Uncle Reinhold's religion or whether he attends church. She gave the same

answer for her Uncle George. She is not baptized to any religion. Her father has no religious belief. (Tr. 371-373).

Reinhold Max Thiele, Jr., testified as follows:

He has a pilot's license and identified his pilot's record and log book. (Exhibit R-VR-7). During periods in 1968 he flew from Anchorage to Alexander Creek while learning to fly and practicing landings and takeoffs. In September and October of 1969, he flew to Alexander Creek to bring in winter supplies and his cousins Randy and Terry. Randy is Carl Thiele's son, and Terry is Randy's son. In January of 1970 he flew to the Creek with his father and took his Uncle Carl with him. In July of 1970 he flew to the fish camp which is located "on the mouth of the Big Su, just on the east side." (Marked as "fish camp" on geological map, Exhibit DR1.) He flew to the fish camp with his father to fish at least six times. On August 1, 1970, he flew from the Creek to Anchorage since the fishing season was over and he brought back groceries. He has continued to fly to the Creek "maybe more, maybe a little less" than he did in 1970. (Tr. 382-387).

He identified an individual by the name of Turner who is Swiss and several other friends of his who are not Native with whom he fished at Alexander Creek in 1970. He also indicated that he took several hunting trips for rabbits, moose, and geese at King Salmon, Bristol Bay, and Chickaloon. (Tr. 387-394).

During the flights to Alexander Creek to fish, the plane would be parked there and they would go to the fish camp by boat which was stored at the Creek. (Tr. 394-400).

Earl Roberts testified as follows:

He lives in Anchorage and is a Native enrolled to the Village of Alexander. He is a carpenter by trade and does maintenance work. He was a fisherman for 25 years before moving to Anchorage. He first moved to Alexander Creek in

the early 1940's with his family and lived there the year round. The Thieles were in Alexander Creek when he first moved there. His home was located 400 feet up from the mouth of the Creek on the south bank and his brother Lawrence has a house there now, as well as Carl Thiele. (Tr. 401-404).

Mr. Roberts' family lived at the Creek until the mid-1950's. His mother bought Fred Winters' home across the Creek and subsequently moved there and built a new home. After his family moved out, he built his own cabin in November of 1957, up the river approximately 1,200 feet above Granite Creek, which is a small creek which comes out on the left of Alexander Creek. He does not own the property where his cabin is located, but has taken steps to acquire the property. In 1967 his wife made application with the Bureau of Land Management to purchase the property. The land was surveyed in 1967 or 1968 and when his wife died in 1971 he became concerned about the land because he had a cabin on it. He was told the land was "frozen" and the matter has yet to be resolved. (Tr. 405-415).

He sold his property in Anchorage in 1971 and intended to build some cabins and acquire some boats in order to start a small lodge in Alexander. He and his wife planned to move there but in view of domestic difficulties they were separated and she subsequently died. He has remarried and his present wife is an enrolled Native. (Tr. 415-422).

Earl Roberts lived in his cabin at Alexander Creek the year around until his son was seven years old and ready for school. He then moved to Anchorage but continued to use his cabin every year until 1965 when he was a fisherman. He stored some of his fishing gear in his cabin. While living in Anchorage, he also worked as a janitor. He built his cabin near Granite Creek because he was married and wanted to be "by ourselves." He stated that if he could get title to the land and capitalization for a small lodge, he would definitely move back. (Tr. 423-426).

Mr. Roberts pointed out an area on an aerial photograph as an area that is "ideal for all village areas." He indicated that the land above the shallow part of the Creek is "real nice land." It is "nice, high ground, berries, very wonderful country." The mouth of Alexander Creek is a good site for a village because of fresh water which is navigable and good timber. It is "just the right location." (Tr. 426-432).

He knew of an Indian village at the Creek prior to the time his family moved there, and it was approximately 1,200 feet within the mouth of the Creek. It was located within the area of Karl Thiele's property, but his (Roberts') cabin is not within this area. After his father's death, his mother remarried Emil Giese. His mother was living on her property in 1970 but moved to Anchorage in 1972 because she needed medical attention. His brother Donald owns property at Alexander Creek and it is located 300 feet from the mouth of the Creek between the mouth and the Vera Giese property. There is a cabin on the property which his brother is working on. His brother does not live there year around but stays there when he goes to the Creek. His brother is a commercial guide and fisherman, and when he is in Anchorage he rents a room or stays with his mother. His brother Harold is a guide and fisherman but does not own any property. (Tr. 432-435).

Mr. Roberts stated he spent some time at Alexander Creek in 1970 when he went moose hunting. He stayed at his cabin for one day and then "moved on up the Creek." In 1970 he did not stop to see his mother. His brother Lawrence lives at the Creek and is a guide and fisherman. He could not state how often his brother visited the Creek. (Tr. 435-436).

Mr. Roberts stated his present job prevents him from fishing and from spending much time at Alexander Creek at his cabin. He has a two-week vacation and that would be

the maximum time he could take off. He also said he couldn't go on weekends because you get weathered in too easy over there. (Tr. 437-438).

Mr. Roberts stated that when his family moved to Alexander Creek, Fred Winter was living there, and further up the river George Turner, Lloyd Rameer, the Sinclairs, and the Duckers were living there year round. (Tr. 441-442).

Mr. Roberts stated that when he filled his application for enrollment as an Alaska Native he originally indicated Anchorage as his permanent residence as of April 1, 1970, but subsequently made a change to indicate that Alexander Creek was his place of residence. He made the change because he didn't know that a village of 20 people could be called a village. He "figured there were enough people there to classify that as a village." (Tr. 444-445).

On cross-examination Mr. Roberts testified that his mother purchased "Fred Winters' place" for one dollar. Mr. Roberts' father was a Welshman and his mother is half Aleut. (Tr. 448-449).

Mr. Roberts indicated that he would hope that any lodge that he builds on the Creek would grow into a bigger operation and that in the future "they would open that country up." He would expect to make a decent living and would probably have some competitors. He stated that the last few years he hadn't spent much time at Alexander Creek and "there has been things going on the last few years I'm not familiar with." (Tr. 453-454).

He reiterated that he went to his cabin at Alexander Creek once in 1970 but did not stop by his mother's house. He saw no one while he was there. "Everything seemed to be just still and dead, it seemed pretty quiet." Mr. Roberts stated he moved to Anchorage in 1956. He took a two-week vacation last year up the Denali and Richardson. He did not own or rent a trapline at Alexander Creek in 1970, nor did his brother Thomas, who works for the State Troopers.

Thomas has lived in Anchorage and the Anchorage vicinity for the past 10 years. Harold has lived in Anchorage and out at Alexander Creek for the past 10 years and moves around quite a bit. His sister Vera has lived in Anchorage for the past 10 years. (Tr. 458-466).

Reinhold Thiele, an enrolled Native, stated that he is an airline pilot and has been so employed for 29 years. His family moved to Alexander Creek in 1939 whn he was a child and he lived there until he was able to work. He worked most of the summers and spent most of his winters at Alexander. From 1945 to 1950 he worked and fished at Bristol Bay. In 1950 he moved away from the Creek to Dillingham (in Bristol Bay). He has lived in Anchorage since 1956. He has lived at his present address in Anchorage since 1961. (Tr. 475-477). He visits Alexander Creek practically very week with his wife, children, and brothers. He built a cabin at the Creek but does not own the land. He intends to move to Alexander Creek on a permanent basis when he retires as a pilot in 12 years but he cannot build a substantial home until he acquires title to his property. He built his cabin on the Creek last year. (Tr. 477-478). He has fished and guided over the years and he and his brother Carl have several fish sites east of the mouth of the Big Susitna River. He and his brother Carl have hunted for beluga whale and sold it commercially. In 1970 he hunted for moose at Alexander Creek and used his brother's house as a base. He also picked berries there and went there for enjoyment. His sisters Bertha and Louise were at Alexander Creek for a month in 1970 and he took them there in his brother-in-law's airplane. His parents are buried there and so is his sister Anna Louise's daughter. His brother George often goes to the Creek to fish and guide. He owns his own airplane and is now in Fairbanks where he is employed as a pilot. (Tr. 478-482).

Reinhold's mother taught him and his brothers and sisters to speak Eskimo. He is quarter Indian, quarter Eskimo

and half German. He is not related to Lawrence Roberts, but understands that he is half Aleut. Reinhold's maternal grandmother's name was Anastasia Clark. His grandfather was Eskimo. (Tr. 482-485).

Mr. Thiele stated he was taught to hunt and fish by his brothers and mother. His parents had traplines at the Creek. He has been to Eskimo villages many times. He asserted that he "shared a village" at Alexander Creek. It was not an Aleut village. In response to a question as to what type of village Alexander Creek is, he answered "Native," "where Native people of Alaska make their living and live." (Tr. 485-490). He would not consider a recent arrival to Alaska as a Native unless he's been there a long time. Many of the Natives are semi-nomadic. He had to leave Alexander Creek in order to make a living. He had to "start joining the white man." He has spent the past 10 or 12 winters in Anchorage. He was aware of an old abandoned Indian village at Alexander Creek and it was on his property. It was not occupied at the time his family went there. The Indians buried their dead. The cemetery is behind the buildings that he put there. In the Eskimo and Aleut culture, the father is the leader of the family unit. His father was an American citizen of German descent. In response to a question as to whether, in his opinion, there is someplace at Alexander Creek that is now a Native village and was in 1970, he responded, "Well, my brother's lived there continually and we've always gone back and I feel it's home to me." He stated he felt it was a Native village. (Tr. 490-494). He considered his brother Carl to be the leader of the village in 1970. There is and was no village council. "It's kind of free and easy," and "we lived there and enjoyed it." He uses his cabin as a summer home when he needs a break from flying and "continually" goes there. (Tr. 494).

Steve Novak is married to Reinhold's sister and has "never really lived" at the Creek. Reinhold has always considered Alexander Creek as "home," and "never considered

it a village as such," but after reading the "Native Land Claims" he decided that he, his brothers, and the Roberts were "eligible." Recently, they decided to incorporate the village. He considers Alexander Creek to be a village because mail is delivered there. He considers that George Trainer and Roy Verneer are part of the village because they were there in 1970. He wouldn't consider "Gayke [sic] or Hawksworth" to be part of the village because they weren't there all the time. (Tr. 499-507).

During the past 10 years all of his children have resided in Anchorage. (Tr. 516).

Lawrence Roberts testified that:

He moved to Alexander Creek in 1940 but had previously visited in 1932 as a youngster. He was living in Alexander Creek in 1970 and during that time he saw his brother Harold during the winter and summer. Harold stayed with his mother while fishing and trapping. His brother Donald was there in 1970 cutting logs for a cabin which he was building. He also saw his brother Tom in Alexander Creek in 1970 but did not know how long he was there. His brother Donald owns five acres of land in Alexander Creek. (Tr. 519-521). Andrew Anderson lived in Alexander Creek during 1967 or 1968 but moved to Anchorage because his son needed special education. (Tr. 523-524). His mother was living at Alexander Creek full time in 1970. He is a commercial fisherman and registered guide. He stays at Alexander Creek from October to the first part of May. In May he usually goes brown bear hunting until the end of May and then commercial fishing in Bristol Bay. He returns home for a week or two then guides until October. (Tr. 525). His brother Tommy, who was employed as a State Trooper, visited Alexander Creek during his annual leave and while there he would hunt. Tommy recently purchased two boat motors, and Lawrence believed that upon retirement his brother would probably go to Alexander Creek, but has

never discussed it with him. (Tr. 531-532). Lawrence believed that Tommy was at the Creek during the summer of 1970 but could not say how long he spent there. In 1970 Lawrence saw his brother Earl while fishing at Cottonwood, which is 30 miles from Alexander Creek near the Beluga River. (Tr. 534).

Lawrence stated that he always thought of Alexander Creek "more or less" as an existing village. (Tr. 536).

Lawrence Roberts stated that he did not know Linda Ramos, Richard Thiele or Clarence Thiele. (Tr. 538). He indicated the absence of any community facility at Alexander Creek, and stated that he did not consider Emil Giese, his stepfather, to be a member of the village. (Tr. 541-542). Lawrence stated that he has seen George Thiele at the Creek, but could not say if George brought his children with him or not. (Tr. 546).

Discussion of Issues one and three—25 or more Native residents and use of the Village by 13 or more Natives.

The question of residence is governed by the definition contained in 25 CFR 43h.1(k), and by previous decisions issued by the Board relating to the eligibility of certain listed villages. Permanent residence is defined in the regulations as follows:

> "Permanent residence" means the place of domicile on April 1, 1970, which is the location of the permanent place of abode intended by the applicant to be his actual home. It is the center of the Native family life of the applicant to which he has the intent to return when absent from that place. A region or village may be the permanent residence of an applicant on April 1, 1970, even though he was not actually living there on that date, if he has continued to intend that place to be his home.

The official Alaska Native Roll for the Village of Alexander Creek lists 37 individuals enrolled to that village. Five of the enrollees testified at the hearing.

The State of Alaska and the Borough relied primarily on documentary evidence in the presentation of their case, including certified copies of birth certificates, marriage certificates, voter registrations, copies of driver's license applications, a family list, and several letters by various enrollees requesting Column 16 changes on their enrollment applications. In addition, the Appellants relied on the testimony of witnesses in an effort to establish that most of the enrollees who claim residence at Alexander Creek did not live there in 1970.

The Family List contains the information placed in Columns 16 through 21 of the Alaska Native Enrollment Application Form (A-S-1). Columns 16-21 on the application form correspond to listings (1)-(6) on the Family List. Column 16 of the form requests "Your Permanent Residence as of April 1, 1970." Column 17 requests "Your Permanent Residence as of the date you complete this form." Columns 18 through 21 read as follows:

> Column 18 Region and village or city where you resided on April 1, 1970, if you resided there two or more years without substantial interruption.

Carl Jacob Thiele, Carl Gustav Thiele, Jr., Cynthia Thiele, Pamela Thiele, Karen Thiele, Teresa Thiele:

Carl Jacob Thiele originally placed "Alexander Creek" in Columns 16, 17, 18 and 19 of the enrollment application he submitted for himself and his children Cynthia and Pamela. Column 20 shows "Tuluksak" for himself and "Anchorage" for the two girls. His daughter Teresa originally placed "Alexander Creek" in Columns 16, 17, 18, and 19 of her separate enrollment application; "King Salmon" in Col-

umn 20 and "Tuluksak" in Column 21. His daughter Karen originally placed "Alexander Creek" in Columns 16, 18, and 19 of her separate enrollment form. Column 20 shows "Anchorage" and Column 21 shows "Tuluksak." His son Carl Gustav, Jr., originally placed "Alexander Creek" in Columns 16, 18, and 19 of his separate enrollment application; "Anchorage" in Column 17, "Whittier" in Column 20; and "Alexander Creek" in Column 21 (A-MSE-2).

Documentary evidence introduced by the State includes Carl's voter registration card dated October 30, 1968, showing an Alexander Creek residence address and a declaration he had been a resident of the Susitna election precinct (which includes Alexander Creek) for 29 years (A-S-6a); his birth certificate and those of his children show information corresponding to data on their enrollment applications (A-S-6b, d, e, f, g, h). Usual residence of the mother on Pamela (1960), Carl Gustav (1956), and Karen's (1954) birth certificates is shown as "Alexander Creek." Carl, Sr.'s driver's license application dated August 24, 1970, shows an "Alexander Creek" address (A-S-6j) as does his daughter Karen's issued May 26, 1972 (A-S-6-N). Driver's licenses applications for Cynthia (May 13, 1973) and Carl Gustav, Jr., (October 26, 1972), show the same Anchorage address (A-S-6-M, K).

Appellant's witness Donald G. Tracey, Deputy Assessor for the Matanuska-Susitna Borough, testified that Borough records show that Carl Jacob Thiele owns real property at Alexander Creek. (Tr. 48-50).

Appellant's witness Ernest Hawksworth testified that Carl Thiele's home is downstream from his on Alexander Creek (Tr. 72); that Carl Thiele and his family occupied his property in 1970, and it has always been his residence. (Tr. 94-98).

There is no dispute that Carl Thiele and his five children were residents of Alexander Creek on April 1, 1970. (ALJ's Recommended Decision, p. 33). The Board concurs and further finds that Carl Thiele and his five children used Alexander Creek as a place where they actually lived for a period of time in 1970. (See the summary of Karen Thiele's testimony, supra.)

Reinhold Thiele, Sr.:

Reinhold Max Thiele, Sr., originally placed "Anchorage" in Column 16 of his enrollment application. "Anchorage" is placed in Columns 17, 18, and 19. "Bethel" is placed in Column 20 and "Kuskokwim" in Column 21 (A-MSB-2).

Documentary evidence introduced by the State relating to Reinhold Thiele and his family includes a voter registration card for Reinhold dated November 5, 1963, showing an Anchorage mailing address and a declaration that Reinhold was a resident of the Anchorage election district for 7 years (A-S-10a); a voter registration card for his daughter Elsie, dated May 18, 1970, showing the same Anchorage address, and a declaration she was a resident of the Anchorage election district for 8 years (A-S-10b); a voter registration card for his son Reinhold, Jr., dated January 31, 1972, showing the same Anchorage address, and a declaration he has been a resident of the Anchorage election district for 8 years (A-S-10c); a voter registration card, dated April 29, 1971, for his daughter Gloria B. Thiele, showing the same residence address as her father's, and a declaration she was a resident of the Anchorage election district for 15 years (A-S-10d); a voter registration card for Reinhold's son Karl, dated April 30, 1971, showing the same residence address as his father, and a declaration he had been a resident of the Anchorage election district for 16 years (A-S-10e); a marriage cetificate dated 1950, showing Reinhold's residence and that of his bride to be Dillingham (A-S-10g); a birth certificate for his son Karl Jacob in Bethel, showing the usual residence of his mother to be Aniak in 1954 (A-S-10h); a birth certificate for his daughter Tamara, showing the usual residence of her mother to be Anchorage in 1957 (A-S-10i); a birth certificate for his

daughter Stephanie, showing the same Anchorage street address in 1959 as in 1957 (A-S-10j); a birth certificate for his daughter Thane, showing the same Anchorage address in 1960 (A-S-10k); a birth certificate for his son Gary, showing the same Anchorage residence address as the voter registration cards (A-S-10L); a birth certificate for his daughter Gloria, showing a residence address of Aniak in 1953 (A-S-10m); a birth certificate for Reinhold Max, Jr., showing a parents residence address in Dillingham in 1952 (A-S-10n); a birth certificate for his daughter Elsie, showing a Dillingham residence in 1951 (A-S-10o); a driver's license application for his daughter Gloria, dated April 12, 1972, showing the same residence address as her father's voter registration card (A-S-10p); a change of enrollment application worded identically to that of the Roberts (compare A-S-2k), dated March 29, 1973, witnessed by Carl Thiele and George Jackinsky (A-S-10s).

Appellant's witness Ernest Hawksworth testified that the property on the Creek next to Carl Thiele's residence belonged to Carl's brother, Reinhold Thiele, that the Thieles made improvements on Reinhold's property in 1973, and that there were no improvements there before 1970. (Tr. 87). He testified that, to his knowledge, Reinhold did not live at Alexander Creek in 1970, nor did his son Reinhold, Jr. (Tr. 95). He stated that he sees Reinhold at his brother Carl's house every year, and that he comes very often, although he hadn't observed him spending the night. He stated that, to the best of his knowledge, Reinhold was at the Creek quite frequently in 1970, sometimes several times a month, other times on his job schedule. Some of his children accompanied him frequently, the boys more frequently than the girls. (Tr. 131-132).

Respondent's witness Karen Thiele testified that Reinhold helped her father build the new part of their house at the Creek; that Reinhold stayed overnight at her family's house at the Creek; and testified she had seen Reinhold and

his children at the Creek and at her family's fish camp on Cook Inlet. (Tr. 299-308, 328-329, 338-341—See summary of Karen Thiele's testimony, supra.)

Reinhold Thiele's testimony about his residence since he left Alexander Creek in 1950 corresponds to the infomation on the documentary evidence submitted by the State. He is a commercial pilot by profession and has been so employed for the past 29 years. He is also a professional guide. He was born in the Native village of Bethel, and in 1939, at the age of 16, he moved with his parents to Alexander Creek. He left the Creek in 1950, and after several intermediate moves, he established his home in 1956 in Anchorage. He has resided at his present address in Anchorage since 1961. His residence in Anchorage was desirable for the benefit of schooling for his children, his proximity to employment, and other personal reasons. He stated that he visits Alexander Creek on average weekly intervals and expressed hopes of some day acquiring title to some land along the Creek as a permanent home for use upon retirement. For the past ten years each of his children has resided in Anchorage, and in 1970 his daughters Elsie and Gloria lived with him and his wife in Anchorage.

Mr. Thiele indicated by his testimony that he and his family had sojourned in Alexander Creek in 1970, hunting, fishing, and picking berries, even though they lived in Anchorage. Although Mr. Thiele asserted that he felt that Alexander Creek "was home to me," he also testified that he never considered it a "village as such" but frankly admitted that he "started thinking about it" after the Native Land Claims Act came to his attention and at that point "we decided to go ahead and see if we could incorporate the village."

The record indicates that, in addition to family visits, Reinhold utilized Alexander Creek as a staging area for his commercial fishing interests in Cook Inlet and to some extent for his guiding interests. By his own testimony, Rein-

hold "loves" the place and has "always considered it home" (Tr. 503) and intends to live there when he retires (Tr. 478). Reinhold lived at Alexander Creek from 1939 or 1940 to 1950 and since he left the Creek in 1950, he has, according to the record, continued to visit there on a frequent basis, often bringing his children with him. When he was there, he participated in all the usual activities of his brother Carl's family who were permanently living there. By his own testimony, he was living in Anchorage because of his employment (although he did testify he might be able to commute from the Creek (Tr. 478), but more especially because he wants his children to have the education he never had. (Tr. 510). The record and his own testimony show that Reinhold chose to maintain extremely close ties to Alexander Creek; the frequency of his visits are not in dispute.

Although the Administrative Law Judge found Reinhold Thiele not a resident of Alexander Creek in 1970 (ALJ's Recommended Decision, p. 28), the Board concludes that the frequency of his visits to the Creek, since he left the family home there in 1950, his activities while at the Creek, his expressed intent to return, collectively constitute permanent residence as defined in 25 CFR 43h.1(k). Therefore, the Board rules that Reinhold Thiele is properly enrolled to Alexander Creek and that he used Alexander Creek as a place where he actually lived for a period of time in 1970.

Gloria B. (Thiele) Wilson, Tamara Thiele, Karl Jacob Thiele, Stephanie Thiele, George Thiele, Reinhold, Jr.

All of these enrollees are the children of Reinhold Thiele, Sr. Documentary evidence introduced by the State indicates that all of the above-named individuals were minors still living with their parents on April 1, 1970. Therefore, under the previous Board ruling that for purposes of the Alaska Native Claims Settlement Act, minor children follow the residence of their enrolled Native parent, *Manley Hot Springs*, supra, p. 27, the Board concludes that the above-named children of Reinhold Thiele are properly enrolled to Alexander Creek.

As the Board's previous rulings on the domicile of minor children do not necessarily incorporate a finding that the minor children were ever physically present in the enrolled residence of the Native parent (see *Manley Hot Springs*, supra, p. 27. Sandra Diane (Isaacson) Watson and Forest Duane Isaacson). The conclusion that Reinhold Thiele's minor children are residents of Alexander Creek does not imply that Alexander Creek was a place "where they actually lived for a period of time" in 1970.

The Board finds that appellants documentary evidence consistently showing an Anchorage address for Reinhold Thiele, Sr., and hence for his minor children, and individual documentary evidence showing the same Anchorage address for Gloria and Reinhold, Jr., plus inconsistent responses on the Family List, would collectively raise a substantial doubt that the seven children of Reinhold Thiele did actually live in Alexander Creek in 1970. However, Appellant witness Ernest Hawksworth testified that Reinhold's children did accompany their father on his trips to Alexander Creek "some of them more frequently—the boys would be quite frequent, the girls less frequently." (Tr. 132) While this statement does not place Reinhold's children at Alexander Creek specifically in 1970, Respondent witness Karen Thiele does testify that to her knowledge all of Reinhold's children came out to the Creek in 1970 (Tr. 304), and later, that while she couldn't recall the whole Reinhold Thiele family staying with her family at the Creek overnight, Reinhold would bring his boys and then his girls for overnight stays at different times. (Tr. 343)

The Board concludes that Reinhold's minor children did actually live at Alexander Creek for a period of time in 1970, and are included among the 13 users required by 43 CFR 2651.2 (b)(2).

Elsie (Thiele) Lackey

Elsie (Thiele) Lackey was unmarried and still living with her parents in 1970 (A-S-10b; Tr. 518). Until reaching the age of 19 in January of 1970, she was an unmarried minor. Under the domicile rule that minor children follow the residence of the father and a previous Board ruling that, for purposes of the Alaska Native Claims Settlement Act, minor children follow the residence of their enrolled Native parent, *Manley Hot Springs,* supra at p. 27, Elsie was a resident of Alexander Creek in January 1970.

The attainment of her majority by a minor does not, according to the law of domicile, ipso facto separate her from the domicile of her parents; she merely acquires the power to possess a separate domicile if she desires. 25 AM Jur 2d., Domicile §§ 77 (1971). Because Elsie was single on April 1, 1970, and still living with her parents, and because there is no evidence of a bona fide intention to acquire a domicile separate and apart from the father, Elsie must be considered to have retained her permanent residence in Alexander Creek on April 1, 1970.

George F. Thiele, Sr., Linda (Thiele) Ramos, George Thiele, Jr., Richard Thiele, Clarence Thiele:

George Thiele originally placed "Fairbanks" in Column 16 of his enrollment form which includes his children, Richard, Clarence, George, Jr., and Linda (Thiele) Ramos. Columns 17 and 18 show "Fairbanks" for all enrollees on the application; Column 19 shows "Anchorage" for George and "Fairbanks" for his children; Column 20 shows "Bethel area" for George and two of his children, and "Fairbanks" for two of his children; Column 21 shows "Shageluk." Documentary evidence introduced by the State includes a voter registration form dated November 5, 1968, showing a declaration that George had been a resident of the Fairbanks election district 16 for 40 years, 6 months, and showing a Fairbanks mailing address (AS-5-A); a birth certificate

showing the residence of his parents as Bethel in 1928 (AS-5-B); a marriage certificate showing he was married in Bethel in 1951 and that his residence was Fairbanks (AS-5-C); a marriage cetificate issued in Fairbanks in 1960 showing his residence to be Fairbanks (AS-5-D); a birth certificate for his son Richard in Bethel in 1956 showing the usual residence of the mother as Fairbanks (AS-5-E); a birth certificate for his son Clarence in Fairbanks in 1958 showing the usual residence of the mother to be Fairbanks (AS-5-F); a birth certificate for his daughter Linda in Fairbanks in 1952, showing the usual residence of the mother to be Bethel (AS-5-G); a birth certificate for his son, George, Jr., in Bethel in 1953, showing the usual residence of the mother to be Bethel (AS-5-H); a driver's license application for George Thiele, Sr., dated December 26, 1956, showing a Fairbanks address (AS-5-I); a driver's license application for George Thiele, Sr., dated May 27, 1970, showing a Fairbanks address, and a driver's license application for George Thiele, Sr., dated March 7, 1973, showing the same Fairbanks address (no exhibit number); a driver's license application for George, Jr., dated November 20, 1973, showing an Anchorage address (AS-5-J).

Appellant's witness Ernest Hawksworth differentiated between two Thiele families when asked to identify persons from the Alexander Creek enrollment printout who, to the best of his knowledge, lived at Alexander Creek in 1970. "The youngest Thiele. George—I'm sorry. There are two families, one lived there and one didn't . . . Carl's family lived there." (Tr. 94-95).

Respondent's witness Karen Thiele testified that her Uncle George has set net sites in Bristol Bay and so has her father, Carl. (Tr. 283). She stated her Uncle George comes to Alexander Creek "some time every year" and stops "at our house." When asked how many times a year he comes, she said, "It varies, for the past years he spends more time with us. He has traps out there and he fishes with us so

more time is spent when you fish together, you see more of each other." (Tr. 304-305). She stated George's occupation "is a guide, he was flying for Wien, he has the fishing sites, I'd say his main occupation is guide." She also said George comes out to the Creek by air and that he has two planes. (Tr. 305). When asked if she had specific knowledge of whether her Uncle George was in Alexander Creek in 1970, she stated, "He was out there several times that summer. He came out to fish. He came in the springtime when the hooligan were out." (Tr. 306). Later, after testifying that she spent only July and August at the Creek in 1970 (Tr. 338), Miss Theile was asked again about how many times she saw her Uncle George there in 1970. She responded, "He was there once." She said she thought he came by himself to sport fish. (Tr. 339). She stated that she visited her Uncle George and her cousins in Fairbanks one fall to pick berries (Tr. 344); that George owns a place in Fairbanks and that she imagined that's where he was in 1970. (Tr. 368-369).

Respondent's witness Reinhold Thiele testified that his brother George goes to Alexander Creek and that he has his own airplane. When asked how frequently, on an annual basis, George goes out there, Reinhold stated, ". . . there have been numerous times I have gone off to the Creek and found his airplane out there and him fishing in the Creek. He loves to fish. There's no telling when he shows up. If I go out there tomorrow, he may be sitting there on the bank, fishing." Reinhold said he sees George occasionally in Fairbanks. (Tr. 482).

Respondent's witness Lawrence Roberts testified that "George Thiele has been out to the Creek ever since I've been out there he's been out three or four times, and each time he stayed three or four days that I know of." When asked if George's children had been with him, Lawrence stated, "Well, while George was visiting with his brothers, whether he brought his children with him or not, I don't know." (Tr. 545). He stated he didn't know Linda Ramos,

Richard or Clarence Thiele (Tr. 538); and that George is on the Board of Fish and Game. (Tr. 540).

The Administrative Law Judge found that George F. Thiele, Sr., and his four children were not residents of Alexander Creek in 1970, and did not actually live there for a period of time in 1970. (ALJ's Recommended Decision, pp. 28-29).

The evidence indicates that the Thiele family moved to Alexander Creek in 1939 or 1940 when George was 11 or 12 years old. George was married in Bethel in 1951 and gave his residence as Fairbanks. His children were born in Bethel or Fairbanks and he has apparently lived in Fairbanks since 1956. Respondent's witness Karen Thiele's testimony indicates that George spends more time with her family at the Bristol Bay fish camp than at Alexander Creek. She was able to place George at the Creek only once in 1970, and then to sport fish alone. Reinhold Thiele's testimony does not place his brother at the Creek in 1970. Lawrence Roberts' testimony as to George's visits is vague as to George's activities at the Creek. There is even less testimony about George Thiele's children in connection with Alexander Creek. Neither George nor any of his children testified as to their intent to return to Alexander Creek.

The Board concludes that one visit to Alexander Creek to sport fish in 1970 and other occasional fishing trips are insufficient to establish domicile, or that Alexander Creek was the "center" of the George Thiele's "Native family life." Lacking testimony from George Thiele or any of his family, the Board also concludes there is no evidence of intent to return.

Therefore the Board concurs with the Administrative Law Judge's finding that George F. Thiele, Sr., and his four children were not residents of Alexander Creek in 1970, and therefore cannot be counted as enrolled residents who used Alexander Creek as a place where they actually lived for a period of time in 1970.

Anna Louise (Thiele) Novak, Henry K. Novak, Carl V. Novak, Louise G. Novak, Kathleen P. Novak, and Stephanie N. Novak:

Anna Louise originally placed "Alexander Creek" in Column 16 for herself and her children Henry K., Carl V., Louise G., Kathleen P., and Stephanie N. Columns 17 and 18 are left blank. Column 19 shows "Alexander Creek" for herself and "Anchorage" for her children. Column 20 shows "Bethel" for herself; "Clark's Point" for Henry and Carl; "Dillingham" for Louise; and "Anchorage" for Kathleen and Stephanie. Column 21 shows "Aniak" (A-MSB-2).

Documentary evidence submitted by the State pertaining to Anna Thiele and her children includes a voter registration card dated November 5, 1968, showing an Anchorage mailing address and a declaration that Mrs. Novak had been a resident of Anchorage election district 8 for 7 years, 6 months (A-S-8a); a voter registration card for her husband Stephen Novak dated November 5, 1968, showing the same Anchorage mailing address and declaration that he had been a resident of Anchorage election district 8 for 7 years, 6 months (A-S-8b); Anna Louise's birth certificate showing she was born in Bethel in 1930 and her parents' residence was Bethel (A-S-8c); a marriage certificate dated December 31, 1949 in Dillingham showing a Clark's Point residence for both Anna Louise and her husband (A-S-8d); a marriage certificate dated October 14, 1959 in Anchorage, showing Anna Louise's residence to be King Salmon and her husband's to be Homer (A-S-8e); a marriage certificate dated October 3, 1960 in Anchorage, showing Anna Louise's residence to be King Salmon and her husband's to be Anchorage (A-S-8f); a birth certificate for her son Henry dated September 21, 1950, showing him born in Clark's Point, Ann Louise's residence in Clark's Point, and her mailing address in Anchorage (A-S-8g); a birth certificate for her son Carl dated September 1, 1954, showing him born in Clark's Point, Anna Louise's residence at Clark's

Point, and the same Anchorage mailing address (A-S-8g); a birth certificate for her daughter Louise dated November 10, 1955, showing her born in Kanakanak, Anna Louise's residence as Clark's Point, and the same Anchorage mailing address (A-S-8i); a birth certificate for her twin daughter Stephanie, showing the same residence information (A-S-8k); a driver's license application for Anna Louise dated March 1, 1960, showing the same Anchorage mailing addresses as did her voter registration cards and children's birth certificates (A-S-8m); a driver's license application for her son Steve dated August, 1967, showing the same Anchorage mailing and residence address (A-S-8n); three driver's license applications for her son Henry, showing a separate Anchorage mailing address on the application dated December 2, 1971, and the same mailing address in Anchorage for the two dated respectively July 23, 1970, and March 18, 1970 (A-S-8o); a driver's license application for her son Carl dated November 27, 1970, showing the same Anchorage mailing address (A-S-8p); a driver's license application for Carl dated November 20, 1973, showing the same Anchorage mailing address and a separate residence address (A-S-8q); a July 21, 1972 driver's license application for Louise Gail, showing the same mailing address and a separate residence address (A-S-8r).

Appellant's witness Ernest Hawksworth did not mention Anna Louise or her children when asked to identify persons from the Alexander Creek enrollment printout who, to the best of his knowledge, lived at Alexander Creek in 1970 (Tr. 93-96). He later testified that he knew who the Novak family was, that Anna Louise is a sister to Carl and Reinhold, that he has seen "him" (Mr. Novak) there occasionally. "The husband has an airplane. But I have never seen any of them there personally, except him, rarely." (Tr. 137).

Respondent witness Karen Thiele testified her Aunt Louise comes out to the Creek "a couple of times a year" and "she's afraid of airplanes." She stated Louise's children come out on an annual basis more frequently than their mother. (Tr. 305). She stated her Aunt Louise and Aunt Bertha spent about a month at the Creek in 1970 at "our" house and that Louise's husband flew up on the weekends while they were there. (Tr. 307). She later testified that she saw her Aunt Louise and Aunt Bertha early in June at the Creek, that the Aunts were there during the time "we weren't living in the house" and the Aunts were out "like just for a visit." (Tr. 340-341). When asked where her Aunt Louise and her five children lived in 1970, she responded, "Anchorage." (Tr. 369). When asked how often she saw her cousin, Carl Vance Novak, in 1970, Miss Thiele said she didn't know, then stated "he was out at the Creek. I saw him out there once. I saw him once when we came through Anchorage, at his house." She stated Carl Vance was living in Anchorage in 1970. (Tr. 366-367).

Respondent's witness Reinhold Thiele testified that his sisters Louise and Bertha stayed at Alexander Creek in 1970 "I believe for a month," and that he flew them there in his brother-in-law's plane. He stated Anna Louise's daughter who died at Clark's Point was brought back and buried at Alexander. Reinhold stated Anna Louise had "inquired" about obtaining property at the Creek, "but I don't know to what lengths. I remember her talking about getting some property back there and living [there] again." (Tr. 481-482).

The Administrative Law Judge found that Mrs. Novak and her children were not residents of Alexander Creek in 1970 and did not live there for any period of time in 1970. (ALJ's Recommended Decision, pp. 29-30).

The evidence indicates that the Thiele family moved to Alexander Creek in 1939-1940 when Anna Louise was 9 or 10 years old. She was married in Dillingham in 1949 and at

that time gave a Clark's Point residence. Her living children were born in Clark's Point from 1950 to 1955. Some time during this period, one of her children died and was buried at Alexander Creek. At the time of her second marriage in 1959, she was living at King Salmon and in 1960 she moved to Anchorage where she has apparently lived ever since.

Appellant's witness Ernest Hawksworth does not place Mrs. Novak or her children at Alexander Creek in 1970 or any other time. Respondent's witness Karen Thiele placed Mrs. Novak at Alexander Creek for one month "like just for a visit" in 1970. Karen Thiele's testimony as to other visits by Mrs. Novak and her children is vague.

Neither Mrs. Novak nor any of her children testified as to their intent to return, although all live in Anchorage. There is no testimony that Mrs. Novak has done anything other than visit her brother Carl's family occasionally since she left Alexander Creek sometime in the late 1940's. Her one-month visit to the Creek in 1970 was apparently a one-time occurrence in 20 years. There is no other testimony that Mrs. Novak or her children stayed at the Creek even overnight at any other time. Lacking testimony from Mrs. Novak and her children, the Board concludes that annual visits to see relatives and one special one-month visit over a period of 20 years is insufficient to conclude that Alexander Creek is the center of Mrs. Novak's "Native family life" or her domicile, or that when she is absent from Alexander Creek, she intends to return. Therefore, the Board concurs with the Administrative Law Judge's finding that Mrs. Novak and her children were not residents of Alexander Creek in 1970, and therefore may not be counted among the 13 enrolled residents who "must have used [Alexander Creek] during 1970 as a place where they actually lived for a period of time."

The Board notes that while Henry is included on Mrs. Novak's enrollment application, he was over 19 years old

in 1970 (A-S-8g). Henry's driver's license application for 1970 shows the same Anchorage box mailing address as his mother (A-S-8o). Since the Board has determined that Henry's Native parent, Mrs. Novak, was not a resident of Alexander Creek on April 1, 1970, Henry cannot be considered a resident of Alexander Creek under the previous Board ruling, *Manley Hot Springs,* supra. at 27, that minor children follow the residence of their enrolled Native parent. Furthermore, there is no evidence in the record of a bona fide intention on the part of Henry to acquire a separate domicile apart from his mother after he reached the age of majority.

Bertha (Thiele) Tolbert:

Bertha Tolbert originally placed "Anchorage" in Column 16 of her enrollment application. Columns 17, 18, and 19 show "King Salmon" and Column 20 shows "Bethel" (A-MSB-2). Documentary evidence introduced by the State includes her voter registration card dated March 4, 1970, showing a King Salmon address and a declaration that she had been a resident of the King Salmon election precinct for 18 years (A-S-11a); her birth certificate dated August 18, 1924, shows her birthplace as "15 miles below Bethel" and her parents' residence the same (A-S-11b); her marriage certificate dated September 17, 1949 in Dillingham, showing her residence to be Anchorage and her husband's residence as Clark's Point (A-S-11c); her driver's license application dated March, 1961, showing a King Salmon residence address (A-S-11d); a driver's license application dated October 28, 1969, showing a King Salmon address (A-S-11e); a change of enrollment request worded identically to that of the Roberts and Thieles and dated the same as the Thieles, witnessed by Carl Thiele and Virginia Ligada (A-S-11f).

Appellant's witness Ernest Hawksworth did not name Bertha Tolbert when asked to identify persons from the Alexander Creek printout who, to the best of his knowledge,

lived at Alexander Creek in 1970. (Tr. 93-96). He testified he had never seen Mrs. Tolbert at Alexander Creek and it was his opinion she did not live there. (Tr. 137).

Respondent's witness Karen Thiele testified that her Aunt Aunt Bertha and Aunt Louise spent a month's visit at Alexander Creek in 1970, that she and her husband live in King Salmon, and that Bertha makes it to Alexander Creek once or twice a year. "She lives an awful long ways away. When she came to Anchorage, they come to Anchorage, her family does, for doctor visits, and she usually could come out to the Creek." (Tr. 307). Miss Thiele stated her Aunt Bertha would stay "a night or a couple of nights" and she didn't know of any plans on going out to Alexander Creek in the relatively near future. (Tr. 307).

She testified that her family goes to their fish camp in Bristol Bay by taking a commercial flight from Anchorage to King Salmon and that they visit Aunt Bertha going down and back to fish camp. (Tr. 345-347). She stated that Bertha lived in King Salmon in 1970 (Tr. 369), that her Aunt Bertha has children, and they are not enrolled to Alexander Creek as far as she knows. (Tr. 273).

Respondent's witness Reinhold Thiele testified he flew his sisters Bertha and Louise to Alexander Creek in 1970 and he believed they stayed there a month. (Tr. 481).

The Administrative Law Judge found that Bertha (Thiele) Tolbert was not a resident of Alexander Creek in 1970, and did not actually live there for a period of time in 1970. (ALJ's Recommended Decision, p. 30.)

The evidence indicates that the Thiele family moved to Alexander Creek in 1939 or 1940 when Bertha was 15 or 16 years old. Her marriage certificate, dated 1949, shows an Anchorage address. There is no documentary evidence or testimony indicating that Bertha has lived outside the Bristol Bay area (Dillingham, Clark's Point, or King Salmon) since her marriage. The only testimony as to Bertha's con-

nection to Alexander Creek since 1949 was in reference to stopover visits enroute to Anchorage for family doctor visits and a one-month stay in 1970, which apparently was the longest visit in 25 years. There is no testimony to indicate that Mrs. Tolbert's visits to Alexander Creek enroute from Anchorage doctor visits were in any different context than the Carl Thiele family's visits to Mrs. Tolbert's home in King Salmon enroute to their fish camp. Lacking testimony from Mrs. Tolbert, the Board concludes that occasional visits to her brother's family at the Creek and a special one-month stay in 1970 is insufficient to establish Alexander Creek as her place of domicile or as the "center" of Mrs. Tolbert's "Native family life" or that when she is absent from the Creek she intends to return. Therefore, the Board concurs with the Administrative Law Judge's findings that Bertha (Thiele) Tolbert was not a resident of Alexander Creek in 1970, and therefore may not be counted amongst the 13 enrolled Native residents who "must have used [Alexander Creek] during 1970 as a place where they actually lived for a period of time."

Vera (Roberts) Giese:

Vera (Roberts) Giese originally placed "Alexander Creek" in Column 16 of her enrollment application. Columns 17, 18, and 19 also show "Alexander Creek." Columns 20 and 21 show "Unalaska." Documentary evidence introduced by the State includes a marriage certificate to Emil Giese showing an Anchorage residence for both in 1948 (A-S-2); birth certificate for her son, Earl Roberts, showing residence of herself and late husband, Thomas Roberts, to be Unalaska in 1921 (A-S-2a); a birth certificate for her son, Lawrence, showing the residence of herself and Mr. Roberts to be McGrath in 1922 (A-S-2b); a birth certificate for her son, Harold, showing residence of herself and Mr. Roberts to be Anchorage in 1935 (A-S-2c); a birth certificate for her son, Donald, showing the residence of herself and Mr. Roberts to be Anchorage in 1939 (A-S-2d);

a birth certificate for her son, Thomas, showing the residence of herself and Mr. Roberts to be Talkeetna in 1927 (A-S-9a).

Appellant's witness Donald G. Tracey, Deputy Assessor for the Matanuska-Susitna Borough, testified that Borough property records reflect that Emil and Vera Giese owned property at Alexander Creek in 1970. (Tr. 65).

Appellant's witness Ernest Hawksworth testified that Emil and Vera Giese lived on their property on the Creek in 1970. (Tr. 94).

There is no dispute that Vera (Roberts) Giese was a resident of Alexander Creek on April 1, 1970. (ALJ's Recommended Decision, p. 33). The Board concurs and further finds that Vera Giese actually lived at Alexander Creek for a period of time in 1970. (See Earl Roberts' testimony, supra.).

Earl Roberts:

Earl Roberts originally placed "Anchorage" in Column 16 on his enrollment application. He also placed "Anchorage" in Columns 17, 18, and 19, with "Unalaska" in Columns 20 and 21 (A-MSB-2). Documentary evidence introduced by the State shows that Earl Roberts was born in Unalaska and that his parents' residence was Unalaska at the time of his birth (A-S-2a). An application for driver's license on September 14, 1956, gives Alexander Creek as both residence and mailing address (A-S-2e). An application for driver's license on April 1, 1970, shows an Anchorage address (A-S-2f). A change of enrollment letter to the Enrollment Coordinator dated March 21, 1974, states "I did not understand the meaning of Column 16, permanent residence, in terms of enrollment regulations. I request that my entry for Column 16, Permanent Residence, be changed from *Anchorage* to *Alexander Creek, Alaska,* because this is my permanent home." The document is witnessed by Karen Thiele and Theresa A. Thiele (AS-2-1c).

Appellant's witness Ernest Hawksworth testified that Earl had a building on Alexander Creek upstream from his home (Tr. 72); that to his knowledge, Earl Roberts did not live in the cabin in 1970, nor did he live anywhere along Alexander Creek in 1970 (Tr. 90); that Earl Roberts' cabin was run down and unused looking, dilapidated; that he never saw him there and never heard of him being there; and that he recalled that Earl was a maintenance man in Anchorage. (Tr. 131).

Respondent's witness Karen Thiele testified that Earl Roberts had a house "probably five or six miles from the Creek. (Tr. 288); that she would consider Earl Roberts "as a part of it . . ." (the village) ". . . but you know, that area, well he's not all the time here." (Tr. 289).

Respondent's witness Reinhold Thiele's testimony does not make any reference to Earl Roberts' living at Alexander Creek or visiting there in 1970.

Respondent's witness Reinhold Thiele, Jr.'s flight log (RVR-7) makes no reference to Earl Roberts.

Respondent's witness Lawrence Roberts testified that in 1970 his brother Earl commercial fished in Cottonwood, about 30 miles from Alexander Creek and that Earl spent the spare time through the summer at his own place on Alexander Creek (Tr. 534). Later, when informed that Earl Roberts had testified that he had spent only one day at the Creek in 1970, Lawrence stated ". . . to the best of my knowledge, I thought he had been up there off and on several times off and on during that summer." (Tr. 547).

Earl Roberts' testimony indicates that he moved to Alexander Creek in the early 1940's with his family and subsequently moved into his own place "up the river." He lived at Alexander Creek continuously until approximately 1956, when he moved to Anchorage, and seasonally while fishing through 1965. In 1970 he spent one day in the Alexandria Creek area while moose hunting and "didn't even stop there" to visit his mother. He also went to his cabin once

in the early part of June. He did not own or rent any traplines at the Creek in 1970, and his present employment would prevent him from spending much time at Alexander Creek. He would definitely like to return to Alexander Creek to start a small hunting and guiding lodge when he can get land and financing.

The Administrative Law Judge found that Earl Roberts was not a resident of Alexander Creek in 1970 and did not actually live there for a period of time in 1970. (ALJ's Recommended Decision p. 28.)

The evidence indicates that from 1940 to 1956 Earl Roberts was a full-time resident of Alexander Creek. By his own testimony he continued to use his cabin up the Creek seasonally until 1965. From then on, the only evidence as to contact with the Creek is Earl Roberts' testimony that he visited once or perhaps twice (the testimony is confusing on this point) in 1970. He does not go there on vacations, nor is he familiar with activities on the Creek occurring in the past several years. There was no testimony contradicting that of Appellant witness Hawksworth that Earl Roberts' cabin is "run down, unused looking, dilapidated."

In previous decisions the Board has given weight to strong expressions of intent to return and testimony by witnesses that they have always considered their enrolled residence as "home," even though they actually returned to their enrolled residence only occasionally each year. (*Manley Hot Springs*, supra. pp. 26-27; *Kasaan*, supra, pp. 21, 24.) Earl Roberts' testimony regarding his intent to return is not expressed in terms of "home" or "family life" activities, but in terms of wanting to start a commercial hunting and fishing lodge. The Board finds it difficult to equate a desire to start a commercial enterprise with a desire to return because the person considers a place to be home. At the same time, the Board recognizes the difficulty of evaluating expressed subjective intent in this instance. Therefore, the Board accepts Earl Robert's testimony that he intends to return—for whatever reason—in the context

of his prior long residence at Alexander Creek as controlling, even though in recent years and in 1970, he returned infrequently.

The Board finds that Earl Roberts' testimony is sufficient to rebut the substantial doubt raised by Appellants and concludes that Earl Roberts was properly enrolled as a resident of Alexander Creek in 1970.

However, just as his own testimony rebutted the substantial doubt raised by Appellants as to his residency, Earl Roberts, by his own testimony, did not actually lived at Alexander Creek in 1970. The Board concludes that while it is difficult to define "actually lived there for a period of time," Mr. Roberts' one-day visit in the area to moose hunt, and perhaps one other one-day visit to his cabin, are insufficient to satisfy even the broadest interpretation of this requirement. Therefore, the Board finds that Earl Roberts may not be counted among the 13 residents who used Alexander Creek as a place where they actually lived for a period of time in 1970.

Lawrence Roberts:

Lawrence Roberts originally placed "Alexander Creek" in Column 16 of his enrollment application. He also placed "Alexander Creek" in Columns 17, 18 and 19. Columns 20 and 21 show "McGrath" and "Unalaska" (A-MSB-2).

Documentary evidence introduced by the State includes a birth certificate showing the residence of his parents to be McGrath in in 1922 (A-S-2b).

Appellant's witness Donald H. Tracey, Deputy Assessor for the Matanuska-Susitna Borough, testified that Borough records show Lawrence Roberts to own real property at Alexander Creek. (Tr. 48-50).

Appellant's witness Ernest Hawksworth testified that Lawrence Roberts and his wife occupied their house at Alexander Creek in 1970. (Tr. 98).

There is no dispute that Lawrence Roberts was a resident of Alexander Creek in 1970. The Administrative Law Judge concluded (ALJ's Recommended Decision, p. 33), and the Board concurs, that Lawrence Roberts is properly enrolled as a resident of Alexander Creek and that he used Alexander Creek as a place where he actually lived for a period of time in 1970. (See Lawrence Roberts' testimony, supra.)

Thomas Roberts:

His enrollment application (AMSB-2) shows that Thomas Roberts originally filled in "Alexander Creek" for Column 16 and Column 19. He listed "Anchorage" for Columns 17, 18, and 20, and "Unalaska" for Column 21. Documentary evidence submitted by the State includes Thomas' voter registration card (A-S-2g) showing that on June 6, 1970, he swore he was a resident of the Anchorage election district for 10 years and that he had a residence address in Anchorage. A driver's license application issued January 1, 1973 (A-S-9c) shows a mailing address c/o Alaska State Troopers, Anchorage. A birth certificate (A-S-9a) shows the residence of his parents at the time of his birth to be Talkeetna. A marriage certificate dated June 7, 1947 (A-S-9b) shows his residence to be Anchorage.

Appellant's witness Ernest Hawksworth made no reference to Thomas Roberts when asked to "identify those persons whose name appear . . . (on the enrollment printout for Alexander Creek) who to the best of your knowledge lived at Alexander Creek in 1970." (Tr. 93-96). Mr. Hawksworth did identify Thomas's brother Lawrence Roberts and his mother Vera (Roberts) Giese (Tr. 94) as living at Alexander Creek. He also said he had met Earl Roberts (Tr. 89), another brother.

Respondent's witness Karen Thiele, responded affirmatively to a question of whether Donald and Harold Roberts "generally appeared at the Creek once or more annually?"

Regarding her knowledge of Tom Roberts' visits, she testified, "He was out there least of all." (Tr. 326).

Respondent's witness Earl Roberts testified that his brother Tommy moved with the family to Alexander Creek in the "very early 40's." (Tr. 402). In response to the question, "Where has your brother, Thomas, lived for the past 10 years?" he stated, "To my recollection, in Anchorage and in the Anchorage vicinity." (Tr. 466).

The only testimony of Reinhold Thiele, relating Thomas Roberts to the village of Alexander Creek, was in connection with a meeting on village eligbility which occurred "one time at Tom Roberts' residence," apparently in Anchorage. (Tr. 511).

Respondents' witness Lawrence Roberts first testified that his brother Thomas "was out there" (at Alexander Creek) the summer of 1970. "I couldn't tell you exactly how long he was there, but he was—he spent a lot of time there in the summer months." (Tr. 521). Later, following testimony that he had spent only the months of October to May at the Creek in 1970 (Tr. 525), Lawrence stated: "In 1970 I don't believe Tommy was up there (Alexander Creek) at any time during the winter months, but he was up there in the summer months in the spring of '70 before I went fishing. How long he was there during the summer months I wouldn't know, because I wasn't there in the summer myself." (Tr. 533).

Lawrence testified that Thomas Roberts moved away from Alexander Creek in "the later 40's" (Tr. 532), that when he left he went to work for a company, which was later the Artic Fuel Company, then joined the Anchorage police force, and later joined the State Troopers. (Tr. 532-533). Lawrence also testified that in 1964 and 1965 Thomas, Donald and Harold were partners in a hunting and guiding business with him, and that Thomas was a State Trooper at the time, but would come to the Alexander Creek area to hunt during his annual leave time. (Tr. 528, 529, 531). He

also testified that Thomas recently purchased two new 50-horsepower outboard motors to go to Alexander Creek and that, while his brother has never talked to him about land at Alexander Creek, Thomas thought he was going to have part of his mother's land and had spoken to Lawrence about building a cabin on the land that he might get. (Tr. 532). In response to the question, "Has he ever talked to you about staying there a longer time or coming back to Alexander Creek?" Lawrence responded, "Well, I imagine when he decides to retire he will probably come back." (Tr. 532).

In summary, the record shows that Thomas Roberts was born in Anchorage in 1927; that about 1940, when Thomas about 13 years old, his family moved to Alexander Creek, and that in the late 1940's he moved to Anchorage for employment (his marriage certificate, dated 1947, states Thomas' age as 19 years, and gives an Anchorage residence address). He continues to reside in Anchorage at the present time.

Respondents' witnesses, except for Lawrence Roberts, either do not mention Thomas or place him at Alexander Creek infrequently. While Thomas listed Alexander Creek both in Column 16 (your permanent residence as of April 1, 1974) and in Column 19 (Region and village or city where you previously resided for an aggregate of ten years or more), the records and testimony show that Thomas lived at Alexander Creek from 1939 or 1940 to perhaps 1947; that he has been a resident of Anchorage since 1947; and that his contact with Alexander Creek since 1947 has been limited to annual visits, with the possible exception of the 2-year period when he was in the guiding business with his brothers and hunted at the Creek during his annual leave.

Since Thomas did not appear as a witness, the Board concludes that the speculative testimony of Lawrence Roberts, concerning the possibility that Thomas may plan to build a cabin on part of his mother's acreage, the purchase

of two boat motors, and annual visits without a stated intent to return, are not sufficient to establish Alexander Creek as the place of domicile or as "the center" of Thomas' "Native family life."

Therefore, the Board concurs with the Administrative Law Judge's decision (ALJ's Recommended Decision, p. 31), that Thomas Roberts was not a resident of Alexander Creek in 1970 and may not be counted amongst the 13 enrolled Native residents who "must have used [Alexander Creek] during 1970 as a place where they actually lived for a period of time."

Donald Roberts:

Donald Roberts originally placed "Anchorage" in Column 16 of his enrollment application; "Anchorage" also appears in Columns 17, 18, 19 and 20; and "Unalaska" in Column 21 (AMSE-2). Documentary evidence introduced by the State includes: his birth certificate (A-S-2c) showing an Anchorage residence for both parents at the time of his birth; a driver's license application dated November 6, 1958, showing an Anchorage post office mailing address and an Anchorage street address (A-S-2i); a driver's license application dated November 24, 1969, showing the same Anchorage post office box address; a driver's license application dated July 1972, showing the same Anchorage post office box address and a residence address that is the same as his brother Earl's (cross reference to A-S-2f); and a driver's license application dated August 2, 1972, showing the same post office box address and an Anchorage residence address (A-S-2j).

Appellant's witness Ernest Hawksworth made no reference to Donald Roberts when asked to identify persons from the Alexander Creek enrollment printout who, to the best of his knowledge, lived at Alexander Creek in 1970. (Tr. 93-96). Mr. Hawksworth testified that there is a partly-finished building right below (Giese's) that was there in 1970 and that's been there many years and never was

finished. He stated it was not occupied in 1970, that it was not worked on in 1970 and that it was his understanding that it was one of the Roberts' boys'. (Tr. 89-90). Later Mr. Hawksworth reiterated that it was an old house that was started and never finished and that from hearsay he believed it was Donald Roberts'. (Tr. 127).

Respondent's witness Karen Thiele identified a picture of a partially-finished building toward the mouth of the Creek as a house belonging to Donald Roberts that the Roberts were building several years ago and never quite finished. She said there is no floor down inside and it's not finished inside. Miss Thiele said that when her dad is trapping, the house is used for stretching and drying skins. (Tr. 288).

Karen Thiele answered "yes" when asked if, to her knowledge, Donald and his brother Harold were at Alexander Creek in 1970, and "yes" to the question, whether or not Donald and Harold appeared at Alexander Creek once or more annually. She stated, her specific recollection of Donald and his brother Harold being there was that "they were there." She said Donald and Harold stayed at their mother's place (Vera Robert Giese) before she sold the house at the Creek in 1972 or 1973. (Tr. 325-326).

Respondent's witness Earl Roberts testified that his brother Donald had property 300 feet up from the mouth of Alexander Creek; that there was a cabin on the property; that he believed it was completed; and that the last he heard, Donald was working on the floor. In response to the question, "Does your brother Donald live there year around?" Earl Roberts said, "Oh, no, no." He stated that Donald used the property for a place to stay when out there, and that he did not know with what frequency Donald goes out there. (Tr. 434).

Earl Roberts stated that Donald is a commercial guide and fisherman; that Donald does not have a home in Anchorage; that whenever Donald is in Anchorage, he rents; that

Donald "doesn't have any set rules at all what he does"; that Donald works, goes guiding, rents an apartment or room, and sometimes stays with his mother. (Tr. 434-435). He said he thinks Donald is presently working for Otto Thiele on Otto's tug boat. (Tr. 437).

Respondent's witness Lawrence Roberts testified his brother Donald was at Alexander Creek in 1970, and he thinks at the time Donald was cutting logs since he hadn't quite finished his cabin, and that Donald was staying with his mother while he worked there. Lawrence Roberts stated he imagined Donald wouldn't build a house if he didn't intend to live there (at Alexander Creek). Lawrence stated Donald owns five acres at the Creek that formerly belonged to their mother; that to the best of his knowledge, Donald has property nowhere else; that Donald is living with their mother in Anchorage at the present time; that Donald is in Anchorage most of the time; and that Donald lives with their mother when he is not on the job working. (Tr. 521-522).

The Administrative Law Judge found that Donald Roberts was not a resident of Alexander Creek on April 1, 1970, and did not use it as a place where he actually lived for a period of time during 1970.

The evidence indicates that Donald has lived in Anchorage at least since 1958; and that, although his mother gave him five acres of property at the Creek and he started a cabin there several years ago, he has never finished or lived in the cabin. While his brother Lawrence, places him at the Creek cutting logs for his cabin in 1970, Appellants' witness Hawksworth said flatly the cabin was not worked on in 1970 and Respondents' witness Karen Thiele made no mention of any new work even to the present. She also said the cabin had no floor, thus contradicting Earl Roberts' testimony that he believed the cabin was completed and that Donald was working on the floor. Lawrence Roberts is the only witness who specifically places Donald at

Alexander Creek in 1970, but in view of the contradictory testimony about Donald's activities while allegedly there, the Board does not find Lawrence's testimony persuasive.

Karen Thiele places Donald at Alexander Creek once or more annually in 1970, but is unable to be more specific. There is no testimony as to why Donald does not live at Alexander Creek; he apparently has no children to educate, nor is he tied to employment that would preclude him from living at the Creek if he so desired. His cabin has apparently remained unfinished for years. Therefore, lacking testimony from Donald as to his intent to return, or testimony from other witnesses that place him at Alexander Creek on a more frequent basis, the Board concurs with the findings of the Administrative Law Judge that Donald Roberts was not a resident of Alexander Creek in 1970, and may not be counted amongst the 13 enrolled Native residents who "must have used [Alexander Creek] during 1970 as a place where they actually lived for a period of time."

Harold Roberts:

Harold Roberts originally placed "Anchorage" in Column 16 of his enrollment application; Columns 17, 18, 19, and 20 also have "Anchorage," with Column 21 "Unalaska" (A-MSB-2). Documentary evidence introduced by the State includes his birth certificate (A-S-2c) showing both parents' residence to be Anchorage in 1935. A driver's license application dated October 13, 1958, shows Harold to be in the Army stationed at Fort Richardson, Anchorage (A-S-2h). His change of enrollment letter is worded, dated, and witnessed identically to his brother Earl's (A-S-21).

Appellants' witness Ernest Hawksworth did not identify Harold as amongst the persons enrolled to Alexander Creek who actually lived in Alexander Creek in 1970.

Respondents' witness Karen Thiele testified in the affirmative to the question, "Do you have knowledge of whether or not Harold Roberts was in Alexander Creek in 1970?" She testified that her specific recollection of them

(Harold and Donald Roberts) being at Alexander Creek was "that they were there." She responded affirmatively to a question as to how often Harold and Donald "generally on an annual basis appear at Alexander? Once or more annually?" She stated both Harold and Donald stayed with their mother at the Creek before she sold her house in 1972 or 1973. (Tr. 325-326).

Respondent's witness Earl Roberts testified his brother Harold is a guide and fisherman, that he travels around, and that he owns no property at Alexander Creek or in Anchorage. To his knowledge, Harold helped Donald Roberts build his cabin at the Creek, but Earl Roberts did not have any knowledge of the frequency or lack of it of Harold's visits anywhere along Alexander Creek. He testified that both Donald and Harold work for Otto Thiele on his tug boat. (Tr. 433-437). He also stated that he was trying to talk Donald and Harold into giving him a hand if he starts building a lodge at the Creek. (Tr. 442).

Respondent's witness Reinhold Thiele made no mention of Harold Roberts in his testimony.

Respondent's witness Lawrence Roberts testified his brother Harold lived at Alexander Creek almost continually from 1940 until 1958 when he went into the Armed Service, and then off and on ever since. (Tr. 520). Lawrence said he saw Harold at Alexander Creek in 1970, and that Harold stayed with his mother during that winter and summer. He recalled that Harold fished commercially that summer and during that winter helped him trapping. (Tr. 521). Lawrence stated that when Harold was at Alexander Creek he stayed with his mother, but since she left, Harold would have to stay at his brother Earl's place. (Tr. 522). Lawrence said he thought that in 1967 or 1968 Harold stayed the winter at Carl Thiele's place. (Tr. 523). He stated that in 1964 and 1965, Donald, Harold, and Thomas Roberts had a hunting and guiding business together. (Tr. 528-529).

The Administrative Law Judge found that Harold Roberts did live at Alexander Creek for a period of time in 1970

and was a resident of Alexander Creek in 1970. (ALJ's Recommended Decision, pp. 31, 33). The Judge's decision is based on Harold's brother Lawrence's testimony that Harold stayed with Vera (Roberts) Giese at the Creek during the winter and summer of 1970. Appellants' witness Hawksworth did not mention Harold Roberts being at the Creek in 1970 and Respondents' witness Karen Thiele speaks of Harold's visits in the same "once or more annually" context as she does of Donald's visits. While Lawrence's testimony has been directly contradicted by both Respondents' and Appellants' witnesses regarding other enrollees (See Earl Roberts, Donald Roberts), his testimony regarding Harold is not directly contradicted. Therefore, in view of the fact that Lawrence's testimony regarding Harold's activities at Alexander Creek over the years is generally more specific than his testimony as to other enrollees, and in view of the fact that his testimony concerning the place of Harold's residence during 1970 is not directly contradicted by other testimony, the Board concurs with the Administrative Law Judge's finding that Harold Roberts was a resident of Alexander Creek in 1970 and did actually live there for a period of time in 1970.

Vera (Roberts) Hightower:

Vera (Roberts) Hightower originally placed "Alexander Creek" in Column 16 of her enrollment application; Columns 17, 18, 19, and 20 show "Anchorage;" while Column 21 shows Dutch Harbor (A-MSB-2). Documentary evidence introduced by the State includes a voter registration card dated November 5, 1968, which shows an Anchorage residence and mailing address, and a declaration that she has been a resident of the Anchorage election district for 8 years (A-S-Fa); a birth certificate showing her parents' residence as Anchorage (A-S-Fb); a marriage certificate showing her residence to be Anchorage in 1951 (A-S-Fc); a drivers' license application dated September 5, 1973, showing an Anchorage address (A-S-Fd); a birth certificate for her son born 1952, showing the residence of the parents

to be Anchorage (A-S-Ff); a birth certificate of her daughter born 1958, showing the residence of the parents to be Anchorage (A-S-Fg).

Appellants' witness Ernest Hawksworth does not mention Vera (Roberts) Hightower as among the persons enrolled to Alexander Creek who actually lived in Alexander Creek in 1970, nor does he mention Mrs. Hightower elsewhere in his testimony.

None of the Respondents' witnesses place Vera Hightower at Alexander Creek.

Earl Roberts testified his sister has lived in Anchorage for the last ten years. (Tr. 466).

The Administrative Law Judge found that Vera (Roberts) Hightower was not a resident of Alexander Creek in 1970 and did not actually live at Alexander Creek for a period of time in 1970. (ALJ's Recommended Decision, p. 30.) The Board finds that Respondents' testimony is insufficient in regards to Mrs. Hightower's contact with Alexander Creek to rebut the substantial doubt of her residency raised by the Appellants. As Mrs. Hightower did not testify at the hearings as to any intent to return, the Board concurs with the Judge's findings.

Andrew B. Anderson, Gladys P. Anderson and Harold A. Anderson:

Andrew Anderson, brother to Vera (Roberts) Giese, originally placed "Anchorage" in Column 16 of the enrollment application for himself, his wife, Gladys, and his son, Harold. Columns 17, 18, and 19 also show "Anchorage;" Columns 20 and 21 show "Unalaska" (AMSB-2).

The State introduced no additional documentary evidence on the Andersons. (Respondents' post-hearing brief, p. 28, 29, makes reference to Andrew Anderson's marriage certificate and a birth certificate for his son Harold; however, no such marriage certificate or birth certificate is included in the State's exhibits.)

Appellants' witness Ernest Hawksworth did not mention any of the Andersons when requested to identify persons on the list of enrollees to Alexander Creek who, to his knowldge, lived there in 1970, nor did he mention them elsewhere in his testimony.

Respondent's witness Karen Thiele identified an old photograph of Andrew Anderson by a group of buildings that used to be located across the Creek from the Thiele's bunk house, but are no longer there. She stated the Anderson home flooded and was burned down afterward to clear it away when she was pretty young. She stated that she and her brothers and sisters used to play on the Anderson property quite alot and that Harold Roberts, who was about her age, was a playmate. (Tr. 290-291). Miss Thiele later testified that the Andersons did not leave Alexander Creek immdiately after their home flooded, but stayed at Mrs. Giese's and subsequently left the Creek. She did not know the approximate date of their leaving, but said that the Andersons came into Anchorage to enroll their boy Harold in a special school because of a learning problem. (Tr. 326-327).

Respondent's witness Earl Roberts testified that he thought his Uncle Andrew stayed in the Roberts' old house at the Creek for quite a period of time. (Tr. 406). Later Mr. Roberts stated that he was positive his Uncle Andrew stayed at the original Roberts' homesite, but couldn't tell the number of years. Earl stated that he thought Andrew then stayed with Vera Giese for a while at the new place, then stayed at his (Earl's) place until his boy had completed school in Anchorage. (Tr. 440).

Earl Roberts testified that Andrew Anderson was going to Alexander Creek in the early thirties and that Andrew moved over to the Creek when the Roberts did (in the early forties). (Tr. 451).

Respondent's witness Reinhold Thiele testified that he didn't know what year Andrew Anderson moved out of Alexander Creek. He remembered that Andrew and his

wife had one child who had to have special schooling. Reinhold stated that once in awhile Andrew would come back and that he would see Andrew, but he didn't know when he left. He stated that Andrew was in Anchorage now. (Tr. 516).

Respondent's witness Lawrence Roberts testified that his Uncle Andrew was one of the people who had taken him (Lawrence) up to Alexander Creek several times when he was young and before the Roberts family moved to the Creek in the 1940's. (Tr. 519-520). Lawrence answered affirmatively when asked if his Uncle Andrew lived at Alexander Creek during 1967-68; he stated that Andrew had moved to the Creek in 1940 and had lived about 500 yards up from the entrance of the Creek on th righthand bank. He stated that he (Lawrence), his brother Earl, and Andrew had helped build the house which the Andersons lived in until the late 50's. At that time the house flooded and Andrew moved up to his brother Earl's place above Granite Creek for several years, then moved to Anchorage because of his son who had to have special schooling. Later Lawrence stated he didn't know the exact year Andrew Anderson had moved to town, so he couldn't say. (Tr. 523-524).

The Administrative Law Judge found that none of the Anderson family were residents of Alexander Creek in 1970 and none of them actually lived there for a period of time in 1970. (ALJ's Recommended Decision, p. 30.)

As the Andersons are the only enrollees whose residence is disputed by Appellants for which Appellants did not submit documentary evidence, the first question before the Board is whether or not Appellants raised a substantial doubt as to the Anderson's enrolled residence.

While the Andersons' enrollment application shows no domiciliary relationship to Alexander Creek, in previous rulings the Board has determined that "conflicts between the information contained in Column 16 and that contained

in Columns 18-21 does not by itself contradict the information in Column 16 so as to raise a substantial doubt . . . to the residency of an individual . . . ." *Kasaan,* supra. p. 23, *Manley Hot Springs,* supra. p. 23-24.

Lacking both substantiating documentary evidence and any testimony by Appellant's witness Ernest Hawksworth relating to the Andersons, the Board finds that Appellants failed to raise a substantial doubt concerning the presumption of correctness of the Andersons enrollment to Alexander Creek.

Therefore, the Board reverses the finding of the Administrative Law Judge and concludes that Andrew Anderson, Gladys Anderson, and Harold Anderson are properly enrolled residents of Alexander Creek.

Findings and Conclusions

After careful consideration of the Administrative Law Judge's recommended decision, the transcript of the hearings, the documentary evidence submitted at the hearing as exhibits, and the arguments of the parties contained in their briefs, the Board:

a. concurs with the finding of the Administrative Law Judge that there is no dispute as to the residence at or use of Alexander Creek in 1970 of Vera Roberts Giese, Lawrence Roberts, Carl Thiele and his five children, Carl Gustav, Cynthia, Karen, Pamela, and Theresa;

b. with the exception of the Anderson family, concurs with the findings of the Administrative Law Judge that the Appellants' evidence, viewed as a whole, raises a substantial doubt as to whether the remaining 29 enrollees were residents of Alexander Creek on April 1, 1970;

c. concurs with the finding of the Administrative Law Judge that Respondents met their burden of coming forward with sufficient evidence to rebut the doubt raised by

Appellants in regard to residence in and use of Alexander Creek in 1970 by Harold Roberts;

d. reverses the finding of the Administrative Law Judge regarding the residence of Earl Roberts, Reinhold Thiele and his eight children, Elsie, Reinhold, Jr., Gloria, Karl, Tamara, Stephanie, Thane, and George, by concluding that Respondents presented sufficient rebuttal evidence to establish the residence of Earl Roberts and Reinhold Thiele, Sr., and therefore to establish the residence of Reinhold's eight children, who were minors or unemancipated in 1970;

e. concurs with the finding of the Administrative Law Judge that Earl Roberts did not use Alexander Creek as a place where he actually lived for a period of time in 1970;

f. reverses the finding of the Administrative Law Judge regarding actual use in 1970 by Reinhold Thiele and his eight children; finds that they actually lived at Alexander Creek for a period of time in 1970.

g. reverses the finding of the Administrative Law Judge that Andrew Anderson, Gladys Anderson, and Harold Anderson were not residents of Alexander Creek on April 1, 1970, by concluding that Appellants did not raise a substantial doubt concerning the Anderson's enrollment to Alexander Creek;

h. concludes that 22 persons were properly enrolled residents of Alexander Creek on April 1, 1970, and that 18 of these properly enrolled residents used Alexander Creek during 1970 as a place where they actually lived for a period of time.

Since the finding and conclusion that the village of Alexander Creek did not have 25 Native residents on April 1, 1970, is dispositive of the question of village eligibility, the Board does not find it necessary to reach other issues raised in this appeal, and therefore does not adopt the Judge's findings and conclusions on such issues.

The proposed findings of fact and conclusions of law submitted by the parties have been considered, and except to the extent they have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts or because they are not relevant to the rulings that have been made. *United States* v. *Merle I. Zweifel,* 80 I.D. 323 (1973).

Except to the extent that this decision reflects a favorable disposition, all pending motions are denied.

Pursuant to Section 11(b)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(b)(3) (Supp. II, 1972), the unlisted village of Alexander Creek is hereby certified as *not* eligible for benefits under Section 14(a) 43 U.S.C. § 1613(a) (Supp. II, 1972) of the Act.

Appendices:

A. Recommended Decision of Administrative Law Judge

B. Ruling Denying Motion to Strike

C. Natives Enrolled to Alexander Creek Village

This represents a unanimous decision of the Board.

DATED this 23rd day of October, 1974, at Anchorage, Alaska.

/s/ JUDITH M. BRADY
Judith M. Brady, Chairman
Alaska Native Claims Appeal Board

/s/ ALBERT P. ADAMS
Albert P. Adams, Board Member

/s/ ABIGAIL F. DUNNING
Abigail F. Dunning, Board Member

/s/ JOHN A. WALLER
John A. Waller, Board Member

APPROVED: November 1, 1974

/s/ ROGERS C. B. MORTON
Secretary of the Interior

APPENDIX O

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

August 30, 1974

FISH & WILDLIFE SERVICE, FOREST SERVICE, STATE OF ALASKA, SIERRA CLUB, ALASKA WILDLIFE FEDERATION & SPORTSMEN'S COUNCIL, INC., PHILIP HOLDSWORTH, RALPH BEAMER, ETHEL BEAMER, *Appellants*

v.

ANTON LARSEN, INC., KONIAG, INC., BUREAU OF INDIAN AFFAIRS, *Respondents*

ANCAB # VE 74-21, 74-20, 74-36, 74-57, 74-62, 74-112
Involving the eligibility of the Village of Anton Larsen Bay under the Alaska Native Claims Settlement Act

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE MICHELS

• • • •

The lodging of a quitclaim deed with the Bureau of Land Management does not make this case markedly different from the others decided by the Board in which the Fish and Wildlife Service or the Forest Service was an appellant. Respondents have made much of the uncertainty of appellants' proof on the issue of standing (Posthearing Brief of respondents, at 26). As long as selections have not yet been filed, have not been approved as complying with the requirements of 43 CFR 2651.4, all conflicts have not been resolved pursuant to 43 U.S.C. § 1611(e), and the selections have not been certified (BF Tr. III-75), appellants' proof cannot be wholly certain. There is the same uncer-

tainty about respondents selections as set out in their motion. (See map attached to the motion, ALB Exh. No. 5D). The Board's prior rulings on standing apparently have not hinged on the *certainty* that Refuge or Forest lands would be taken, but on the threat thereof, since the selections were and are tentative.

There are other legal uncertainties connected with the quitclaim deed. Counsel for the appellants argue that the quitclaim would be inoperative because it could not be accepted as a matter of law by the United States to diminish the lands received by Anton Larsen, Inc. if certified (BF Tr. III-112, Conf. 19). Such counsel also argue that quitclaim deeds are generally unacceptable to the United States and that no deed may be accepted to property by an agency of the Federal Government without having had approval by the Department of Justice, Land Division, in Washington, D.C. (BF Tr. IV-5). In response to this position counsel for the respondents argue that the "deed is distinctly secondary," and the principle point is that Anton Larsen, Inc. has relinquished or waived its rights to lands in the Refuge and the Forest (BF Tr. IV-5-6). Thus, the legal status of such a deed or waiver is far from clear. However, these legal uncertainties create a likelihood that each appellant may be injured and thus comes within the definition of a "party aggrieved."

Appellants have also argued and placed into the record evidence suggesting that the public land available on Kodiak Island is limited; therefore, village selections will interact one with the other. This evidence raises the possibility that Anton Larsen Bay's action here might require another village to select lands in the Refuge or Forest it would otherwise not have selected—the type of injury recognized by the Board's definition of standing. *E.g., Uyak, supra* at 8-14. Respondents argue that the Supreme Court has held that standing must be grounded not on an "ingenious academic exercise in the conceivable," but on some cer-

tainty of injury. *United States* v. *SCRAP, supra* at 688. James Calvin, a Forest Service realty specialist, was called by appellant for the purpose of responding to the standing motion. He testified and marked F&W-FS Exh. No. 13 to show that seven villages might have selection rights in the north Kodiak Island area (Tr. II-83, Excerpts Cal-58 *et seq.*). As is evident from the map, the protective withdrawals instituted under 43 U.S.C. § 1610(a)(1)(A) for many of these, Ouzinkie, Woody Island, and Anton Larsen Bay for instance, are largely water. The area available for selection is further reduced by the Coast Guard Base, reserved from selection under 43 U.S.C. § 1610(a), the land subject to selection by the Native residents of Kodiak city under 43 U.S.C. § 1613(h)(3), the fact that some of the villages will be entitled to select, because of population, more than the three township minimum provided by 43 U.S.C. § 1613, and the private holdings in the area which are unavailable for selection.

Mr. Calvin testified that selections by Anton Larsen, Inc., outside of the Wildlife Refuge and National Forest as described by ALB Exh. No. 5D, would create a greater probability that Forest and/or Refuge lands would be selected by another village (Tr. II-96). For example, the described tentative selections of Bells Flats and Anton Larsen Bay require the village of Port Lions to select to the north or west of its core township. However, the selection options of Ouzinkie, Afognak and Litnik, if certified, would appear to *require* Port Lions to select to its west in the Refuge, just as the selection options of Ouzinkie, Port Lions, and Anton Larsen Bay would appear to *require* Litnik and Afognak to select more or all of its land from the Forest. Whether the village would have selected in the Refuge in the first place is not at issue; how conflicts are resolved *between villages* for land both want is not at issue; but whether either appellant is likely to be adversely affected by this juggling of selections *is* at issue.

It is fair to conclude from the evidence that if Anton Larsen, Inc. does not select Refuge and/or Forest lands there is at least a probability that another village with less land to select from will seek land in the Refuge or the Forest (Excerpts Cal-71-77). In considering standing in this case it is appropriate to consider the effects of the action by Anton Larsen, Inc., whether it will affect or injure the appellant directly or indirectly. It is my view that such an indirect effect meets the requirements for standing as set forth in *United States* v. *SCRAP, supra* at 688. In interpreting the *SCRAP* opinion, one court in *Florida* v. *Weinberger*, 492 F.2d 488, 495 (5th Cir. 1974), observed that "[loss of public respect] is a faint and tenuous interest; however, obedient to our apprehension of the *SCRAP* opinion, *supra*, we are convinced that, if real, it is at least 'an identifiable trifle.'"

Accordingly, I find that the Fish and Wildlife Service and the Forest Service are "part[ies] aggrieved" within the meaning of that term as used in 43 CFR 4.700 and the motion is hereby denied. [ALJ's Recommended Decision, pp. 9-10]

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UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
HEARINGS DIVISION
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

August 30, 1974

FISH & WILDLIFE SERVICE, ET AL., *Appellants*

v.

BELLS FLATS NATIVES, INC., KONAIG, INC., BUREAU OF INDIAN AFFAIRS, *Respondents*

ANCAB # VE 74-22
VE 74-37
VE 74-56
VE 74-66
VE 74-111

Involving the eligibility of the Village of Bells Flats under the Alaska Native Claims Settlement Act

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE MICHELS

• • • •

the "deed is distinctly secondary" and the principle point is that Bells Flats Natives, Inc., has relinquished or waived its rights to lands in the Refuge (Tr. IV-5-6). Thus, the legal status of such a deed or waiver is far from clear. These legal uncertainties create a likelihood that the appellant may be injured and thus comes within the definition of a "party aggrieved."

The appellant has also argued and placed into the record evidence suggesting that the public land available on Kodiak Island is limited; therefore, village selections will in-

teract one with the other. This evidence raises the possibility that Bells Flats' action here might require another village to select lands in the Refuge it would otherwise not have selected—the type of injury recognized by the Board's definition of standing. *E.g., Uyak, supra* at 8-14. Respondents argued that the Supreme Court has held that standing cannot be grounded on an "ingenious academic exercise in the conceivable," but on some certainty of injury. *United States* v. *SCRAP, supra* at 688. James Calvin, a Forest Service realty specialist, was called by appellant for the purpose of responding to the standing motion. He testified and marked F&W Exh. No. 20 to show that seven villages might have selection rights in the north Kodiak Island area (Tr. III-58 *et seq.*). As is evident from the map, the protective withdrawals instituted under 43 U.S.C. § 1610(a)(1)(A) for many of these, Ouzinkie, Woody Island, and Anton Larsen Bay for instance, are largely water. The area available for selection is further reduced by the Coast Guard Base, reserved from selection under 43 U.S.C. § 1610(a), the land subject to selection by the Native residents of Kodiak city under 43 U.S.C. § 1613(h)(3), the fact that some of the villages will be entitled to select, because of population, more than the three township minimum provided by 43 U.S.C. § 1613, and private land holdings which are unavailable for selection.

Mr. Calvin testified that selections by Bells Flats, outside of the Wildlife Refuge as described by the respondents' motion, would create a greater probability that Refuge lands would be selected by another village (Tr. III-75-77). For example, the described tentative selections of Bells Flats and Anton Larsen Bay require the village of Port Lions to select to the north or west of its core township. However, the selections of Ouzinkie, Afognak and Litnik, if certified, would appear to require Port Lions to select to its west in the Refuge. Whether the village would have selected in the Refuge in the first place is not at issue; how conflicts are resolved *between villages* for land they both

want is not at issue; but whether appellant is likely to be adversely affected by this juggling of selections *is* at issue.

It is fair to conclude from the evidence that if Bells Flats does not select Refuge lands there is at least a probability that another village with less land to select from will seek land in the Refuge (Tr. III-71-77). In considering standing in this case it is appropriate to consider the effects of the action by Bells Flats, whether it will affect or injure the appellant directly or indirectly. It is my view that the indirect effect above referred to meets the requirements for standing as set forth in *SCRAP, supra* at 688. In interpreting the *SCRAP* opinion, one court in *State of Florida* v. *Weinberger,* 492 F.2d 488, 495 (5th Cir. 1974), observed that "[loss of public respect] is a faint and tenuous interest; however, obedient to our apprehension of the *SCRAP* opinion, *supra,* we are convinced that, if real, it is at least 'an identifiable trifle.' "

Accordingly, I find that the Fish and Wildlife Service is a "party aggrieved" within the meaning of that term as used in 43 CFR 4.700 and the motion is hereby denied. [ALJ's Recommended Decision, pp. 9-10]

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No. 78-512

In the Supreme Court of the United States

OCTOBER TERM, 1978

KONIAG, INC., ET AL., PETITIONERS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

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BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 37a-69a) is reported at 580 F. 2d 601. The opinion of the district court (Pet. App. 70a-91a) is reported at 405 F. Supp. 1360.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1978. By order of July 10, 1978, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including September 25, 1978, on which date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly recognized the administrative standing of the State of Alaska, the Fish

and Wildlife Service, and the Forest Service to protest the initial decision of the Bureau of Indian Affairs within the Department of the Interior on the eligibility of certain villages to receive benefits under the Alaska Native Claims Settlement Act.

2. Whether, after concluding that Interior's procedures had denied due process, the court of appeals, under the circumstances, properly directed a remand to the Secretary instead of reinstating the decision of a subordinate departmental official who had arrived at his decision without any adversary hearing.

3. Whether the court of appeals and the district court correctly decided that the roll prepared by the Secretary under Section 5 of the Alaska Native Claims Settlement Act was not conclusive on the Secretary when later, under Section 11 of the Act, he made his findings of fact concerning Native residence for village eligibility.

STATEMENT

1. By the Alaska Native Claims Settlement Act of December 18, 1971 (ANCSA), 43 U.S.C. (Supp. V) 1601 *et seq.*, Congress adopted a comprehensive legislative scheme to settle the century-old aboriginal land claims of the Alaska Natives. Briefly, the Act extinguished the Natives' claims to about 250 million acres in Alaska and substituted a right to share in a $962.5-million Native Claims fund and to select 40 million acres, to be distributed through eligible Native villages and regional corporations. Of course, only Natives are meant to share in these benefits.

The Act divided Alaska into twelve resident regions in which the Natives organized "Regional Corporations" (plus a thirteenth regional corporation for non-resident Natives). Section 7, 43 U.S.C. (Supp. V) 1606. Depending upon their population, eligible villages were entitled to select the surface estate to between 69,120 and 161,280 acres from the public lands in their vicinity (the regional

corporation would receive a patent to the mineral estate). Sections 12(a) and 14, 43 U.S.C. (Supp. V) 1611(a) and 1613. After all eligible village corporations had made the first-round selections, the regional corporations had the second-round land selection. In the second round, the difference between 22 million acres and the total acreage selected by village corporations in the Section 12(a) first-round selection would be allocated among 11 of the 12 resident corporations on the basis of population;[1] these would then reallocate their share among eligible villages in their region. Section 12(b), 43 U.S.C. (Supp. V) 1611(b). Thereafter, in a third round of selections, 16 million acres would be allocated among the 11 resident regional corporations entitled to Section 12(b) selections. Section 12(c), 43 U.S.C. (Supp. V) 1611(c).

The surface estate to an additional two million acres might be conveyed to regional corporations for cemetery and historical purposes, and to certain entities not otherwise covered; the unconveyed portion of this land would also be allocated among the twelve resident regional corporations. Section 14(h), 43 U.S.C. (Supp. V) 1613(h). Section 12 of the Act, 43 U.S.C. (Supp. V) 1611, restricted villages from selecting the surface estate to more than 69,120 acres from a national wildlife refuge or a national forest.

Section 11(b)(1) of ANCSA, 43 U.S.C. (Supp. V) 1610(b)(1), sets forth a list of more than 200 Native villages, each presumptively eligible for land benefits, subject to "findings of fact in each instance" by the Secretary that such listed villages meet the Act's requirements. In addition, the Act directed the Secretary to make "findings of fact in each instance" as to the eligibility of any non-listed villages claiming to meet those requirements. Listed and unlisted villages with less than

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[1]The regional corporation for Southeastern Alaska was excluded ecause Congress had previously appropriated $7.5 million in ayment of the judgment awarded the Tlingit-Haidas by the Court of 'aims. *Tlingit and Haida Indians of Alaska* v. *United States*, 389 F. 778 (Ct. Cl. 1968).

25 Native residents as of the 1970 census, or which are of a modern and urban character and have a non-Native majority, were ineligible. The Act, however, specified no procedure to be followed in the making of these eligibility determinations.

To implement the statute the Department of the Interior issued regulations. 43 C.F.R. Part 2650 (1973). They provided that the Alaska Area Office of the Bureau of Indian Affairs (BIA) was initially to determine the eligibility for land benefits of each Native village which applied. These initial determinations by the BIA became the Secretary's final decision unless protested "by any interested party" after publication; if reaffirmed after protest, they became final unless appealed to the Secretary. Any "person aggrieved" could appeal to an ad hoc board personally appointed by the Secretary (now called the Alaska Native Claims Appeal Board, 43 C.F.R. 4.700, 2651.2 (5) (1973)). The appeal was to be a de novo proceeding in which parties could request an evidentiary hearing on factual issues. The hearing was to be conducted by an administrative law judge. He would prepare a recommended decision, but it was not final, and was not disclosed to the parties. Instead, it was to be reviewed by the Board with the entire record, including the proposals for a recommended decision which the parties had filed and served on each other. The Board would then formulate its own recommended decision, which it submitted to the Secretary for his approval or disapproval. Only after the Secretary had finally approved the Board's decision did the parties see it.

2. In the instant cases, BIA's Alaska Area Director issued "final" decisions determining that eleven villages, three listed and eight non-listed, were eligible to select lands. Seven of the villages were located on Kodiak Island, or its neighbor, Afognak Island; two on Cook Inlet, where Anchorage is located; one in the Aleutians

(Pauloff Harbor),[2] and one (Solomon) on Norton Sound, east of Nome. The United States Fish and Wildlife Service of the Department of the Interior, the United States Forest Service of the Department of Agriculture, the State of Alaska, and certain environmental groups and individuals appealed one or another of the eleven decisions, contending, in effect, that the villages did not qualify. After full de novo proceedings the Board ruled, in a series of separate decisions approved by the Secretary, that the villages were ineligible, for lack of 25 residents or insufficient occupancy in 1970 (Pet. App. 77a, 92a-344a) The villages and their regional corporations then filed separate suits, which were consolidated, in the district court. The district court issued summary judgment in favor of the villages. *Koniag Inc.* v. *Kleppe*, 405 F. Supp. 1360 (Pet. App. 70a-91a).

The district court held that in four of the cases the protestants had no standing to appeal BIA's decision to the Secretary. Two involved appeals by the Fish and Wildlife Service to protect a wildlife refuge and the Forest Service to protect a national forest. The district court ruled that because the two villages involved had made commitments not to take land from either the refuge or the national forest, the Fish and Wildlife Service and the Forest Service had no interest to protect. (The district court did not discuss the government's argument, accepted by the court of appeals, that if these villages should select other lands, other villages in the region might be forced to choose refuge or forest land.) The two other "standing" cases involved appeals by the State of Alaska, which has a right to choose otherwise unselected lands under its Statehood Act. The district court held that the State had no interest because it had neither actually nor tentatively selected lands in this area prior to January

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[2]The controversy with respect to this Aleutian village was mooted by the Secretary's determination, after the district court's decision, that it was in fact eligible.

1969. Under ANCSA, lands tentatively approved for patenting to the State under its Statehood Act as of January 17, 1969, were withdrawn from selection by eligible villages. Patented lands were not available. The district court viewed the possibility of selections by the State after this date as too speculative to support an appeal against Native claims. The district court ruled that since these four appeals were not initiated by a party with standing, it would set aside the Secretary's decision, and reinstate the "final" decision of the BIA Area Director that the villages were eligible. In the seven other cases the district court rejected the villages' challenges to the appellants' standing.

As to those seven other cases, the district court held that Interior's appeals procedure denied due process, and that the integrity of the appeal process was tainted by legislative interference which destroyed the appearance of impartiality.

The district court viewed the appeal process as establishing a multi-tiered system under which the ALJs' recommended decisions were only the first step in an adversary procedure. To assure that the Secretary was not "foreclosing to himself knowledge of the Natives' contentions," the district court reasoned (Pet. App. 84a), due process required that the adversary process continue, by providing the parties an opportunity to challenge the ALJs' (and presumably the Board's) recommendations to the Secretary.

The district court ruled that the appearance of impartiality had been destroyed by two events: first, by legislative hearings held by a subcommittee of the House Committee on Merchant Marine and Fisheries chaired by Representative Dingell.[3] The hearings, in the nature of

[3] *Hearings on Alaska Native Claims Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 93d Cong., 2d Sess. (1974).

"oversight" proceedings investigating administration of the Native Claims Act, took place while the villages' claims were being litigated before the Secretary. The court found that among the witnesses who appeared at the hearings was Ken Brown, "one of the Secretary's two principal advisors who reviewed the cases personally with him at the time he made his decision in the plaintiff's cases" (Pet. App. 85a). Second, two days before the Secretary made his decision, Representative Dingell had sent a letter to the Secretary requesting him to postpone his decision until the Comptroller General had reviewed the cases. At the least, the district court found, the congressional hearings were followed by the abandonment of proposed settlements which had been under discussion between the Fish and Wildlife Service and two villages on Kodiak.

As to these seven "due process" cases, the district court concluded that the record did not show the effect of the Dingell hearings had been dissipated. Since the statute contemplated that the Native claims would be settled by specified deadlines, instead of remanding to the Secretary the district court decided it was appropriate to reinstate the "untainted decision by the Secretary's delegate," the BIA's Area Director (Pet. App. 88a).

3. The court of appeals affirmed in part and reversed in part (Pet. App. 37a-56a). In the four "standing" cases, it held that the district court had erred in denying administrative standing to the federal and state agencies. *Id.* at 43a-50a. (In a separate concurring opinion, Judge Bazelon agreed with the majority's refusal to equate judicial and administrative concepts of standing. *Id.* at 57a-69a.) In the remaining six cases (see note 2, *supra*), the court of appeals held that under ANCSA prospectively eligible villages have a sufficient property interest to be entitled to constitutional due process protection, and that Interior's "secret review process" had deprived them of that right (*id.* at 51a-54a). The impact of the oversight hearings, however, did not require reinstatement of the BIA Area Director's decisions: the oversight hearings had not so tainted the proceedings that the passage of 3½

years and the presence of a new Secretary made the usual remedy of remand impossible. Pet. App. 54a-56a. The court of appeals directed that on remand the Secretary permit the parties to take exceptions to the ALJs' decisions and to submit briefs to the Appeal Board. Finally, the court of appeals adopted the district court's reasoning that residency was open to redetermination for purposes of village eligibility. *Id.* at 56a.

ARGUMENT

The decision of the court of appeals is correct; it does not conflict with any decisions of this Court; and the issues presented are not of recurring importance. In our view, the court of appeals correctly construed the Alaska Native Claims Settlement Act and applied established principles of administrative law to insure that the Secretary completes the legislative scheme by distributing its benefits to eligible Native entities only.

1. Petitioners concede (Pet. 16) that "[it] may well be that the court of appeals was correct, as a general proposition, that administrative standing and judicial standing are not interchangeable." They argue, however, that the Secretary barred himself from listening to the State of Alaska, the Fish and Wildlife Service, and the Forest Service. That contention, we submit, was properly rejected below.

Because according eligibility status to phantom villages adversely affects bona fide Native groups, the policy of the Act favors a broad concept of standing. We must remember that in Section 11(b)(2), ANCSA specifically directed the Secretary to "make findings of fact in each instance" with respect to the eligibility of villages, even those listed in the statute. This highlights the congressional concern that only Natives should benefit and counsels against a restrictive approach to challenging eligibility. In the circumstances, we submit the court of appeals properly accorded deference to the Secretary's generous interpretation of his own regulation to accomplish the broad purposes of the Act.

2. With respect to the remedy fashioned by the court of appeals, petitioners contend (Pet. 13-15) that the normal procedure of remand was improper because it was less speedy than "reinstating" the BIA Area Director's decisions. Well-settled principles, however, support the court's action.

Again and again, this Court has stated that a reviewing court's function is limited to determining whether the administrative agency has erred. Then, if error is found, the court must remand. The court may not itself direct the agency's decision, for to do so would " 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.' " See, *e.g.*, *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 544-545 (1978), citing *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976), and *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

That rule has special force here. In seeking to "reinstate" the BIA Area Director's decisions, petitioners would compel the finding of village eligibility to be made by a relatively subordinate departmental officer, rather than the Secretary in whom Congress has reposed the fact-finding task. Moreover, petitioners fail to point out that the record shows that the Area Director's decisions were reached without any adversary hearings at all, and then solely upon a field investigation which was administratively determined to be worthless.

3. Petitioners next argue (Pet. 18-20) that, once having determined Native residence in the course of enrollment, the Secretary could not reexamine Native residence for village eligibility purposes. On this issue the court of appeals adopted the district court's interpretation of the Act (Pet. App. 56a). Briefly, the district court reasoned that the roll prepared by the Secretary pursuant to Section 5 of the Act, 43 U.S.C. (Supp. V) 1604, was

different from residence for village eligibility under Section 11, 43 U.S.C. 1610. First, Section 11 does not refer to the roll at all; rather, it provides that residence for village eligibility be based on "the census or other evidence satisfactory to the Secretary." Second, the Section 11 requirement that the Secretary make "findings of fact in each instance" would be unnecessary if Congress had intended the roll to be conclusive. In our view, these considerations fully support the ruling.

4. Lastly, petitioners argue (Pet. 20-21) that, as to petitioner Salamatoff, the court of appeals, by remanding that case along with the other cases, "effectively denied to this petitioner its right to full, proper and meaningful judicial review." This issue was argued neither to the district court nor to the court of appeals.

At all events, the determination of Salamatoff's eligibility is essentially factual, and is, moreover, not yet finally resolved. The ALJ, who ruled initially in petitioner Salamatoff's favor, first concluded it was not a "tribe" or "band" because these concepts embraced the requirement of leadership (ALJ op. 4-5). Then, after reviewing the evidence, he ruled it was a "community or group of the type constituting a Native village within the meaning of the Act" (ALJ op. 17). The Board, however, basing its analysis on the factual evidence and the statute, reversed, concluding that "the persons enrolled to Salamatoff do not constitute a 'tribe, band, clan, group, village, community, or association' within the meaning of Section 3(c) of the Act" (Pet. App. 258a). Since the court of appeals held that due process required that, upon remand, all parties have an opportunity to file exceptions to the ALJs' decisions and to submit briefs to the Appeal Board, it would obviously be proper to allow the Fish and Wildlife Service, along with other parties in the case, to take exception to the ALJ's decision on Salamatoff. This factual matter presents no issue warranting the attention of the Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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